IN THE SUPREME COURT
OF
THE UNITED STATES

October Term, 1977

No. 77-469

ROCCO FERRERA & CO.,
a Michigan corporation,
Petitioner,

vs.

HAROLD MORRISON,
TRUSTEE OF ATLAS
CONCRETE PIPE, INC.,
and/or ATLAS CONCRETE
CONDUIT, INC.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States

Rocco Ferrera & Co., a Michigan corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth

Circuit entered in the above-entitled case on May 6, 1977. On May 11, 1977, a petition for rehearing was filed by petitioner in the Court of Appeals, which was denied by order entered August 26, 1977.

OPINIONS BELOW

The May 11, 1977 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is as yet unreported (Docket No. 76-1165) and is reprinted in the separate Appendix A to this petition, pp.48-62. The prior opinion of the United States District Court for the Eastern District of Michigan, also reprinted in Appendix A at pp. 64-71, is reported as follows: Morrison vs. Rocco Ferrera Co., Inc., 409 F. Supp. 1364 (E.D. Mich. 1975)

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A ,

infra, p. 63) was entered on May 11, 1977. a timely petition for rehearing was denied on August 26, 1977 (Appendix A, infra, p.). The jurisdiction of the Supreme Court is invoked under the provisions of 28 USC § 1254 (1) and 11 USC § 47 (c).

QUESTION PRESENTED

Whether a Bankruptcy Court in an ordinary bankruptcy proceedings, which has ensued from an aborted Chapter X proceedings, has such jurisdiction over an account receivable of the bankrupt corporation as to render a personal judgment against the account debtor, absent the consent of the account debtor to this jurisdiction, but where a civil suit to collect the receivable was commenced in the United States District Court for the same district by the trustee in the Chapter X proceedings prior to the dismissal of the Chapter X proceedings and the account debtor filed an answer to this

civil action without, at that time contesting the jurisdiction which (under the special provisions of Chapter X) was properly lodged in the United States District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Also involved are the following sections of the Bankruptcy Act (Title 11 of the United

States Code), which are set forth in Appendix B hereto:

§ 2 (a) (7) [11 USC 11 (a) (7)]

§§ 23 [11 USC 46]

§ 38 (6) [11 USC 66 (6)]

§§ 101 [11 USC §§ 501]

§§ 102 [11 USC §§ 502]

§§ 114 [11 USC §§ 514]

§§ 115 [11 USC §§ 515]

§ 117 [11 USC §§ 517]

§ 236 (2) [11 USC §§ 636 (2)]

§§ 238 (a) (1) [11 USC §§ 638 (a) (1)]

STATEMENT OF THE CASE

This is a case involving the jurisdiction of the Bankruptcy Court over a suit originally filed by the trustee of Atlas Concrete Pipe, Inc. in a Chapter X proceeding against petitioner Rocco Ferrera & Co., an alleged account debtor, as a civil action in the United States District Court.

On February 22, 1974, Atlas Concrete Pipe, Inc. commenced suit against Rocco Ferrera & Co., petitioner herein, in the Circuit Court for the County of Genesee, to recover an alleged indebtedness of One Hundred Ten Thousand Six Hundred Eight and 87/100 ($110.608.87) Dollars. Petitioner then promptly filed in those proceedings a motion for change of venue, together with a motion to quash writ of garnishment, but, before these matters could be disposed of, Atlas Concrete Pipe, Inc., on March 15, 1974, filed a petition under Chapter X for reorganization in the United States District Court for the Eastern District of Michigan, Southern Division. (R30)*

On March 29, 1974, an order was entered by the District Court, approving the petition under Chapter X, and on April 18, 1974, Harold Morrison was appointed trustee. (R35) Subsequently, on September 9, 1974, Harold Morrison

*References are to Record on Appeal in lieu of Appendix filed in U.S. Court of Appeals for the Sixth Circuit.

trustee, as plaintiff, commenced a civil action by summons and complaint (R45) against petitioner for the alleged indebtedness, in the United States District Court for the Eastern District of Michigan. This complaint is set forth in Appendix C hereto.

It appearing to petitioner that under a Chapter X proceedings the United States District Court did have jurisdiction in the case, and that an answer must be filed to avert default, it did cause to be filed, on November 13, 1974, an answer with demand for jury trial and a counterclaim for breach of contract. (R50).

Several months prior to the commencement of this action, on June 28, 1974, the District Court Judge (Thornton) in the general Chapter X proceedings entered ex parte an order referring the collection of accounts receivable of the debtor corporation to Bankruptcy Judge Harold H. Bobier (R43). Petitioner was not then a party

to the Chapter X proceedings and received no notice then, nor at any time subsequent, that such an order was entered. This order is set forth in Appendix C hereto. Likewise, on November 12, 1974, after petitioner was served with the complaint, but one day before its answer was filed, a second order of reference was entered by District Court Judge Cornelia A. Kennedy (R48), and this order is set forth in Appendix C hereto. This order was also entered ex parte, and petitioner received no notice of its entry or any copy of the order at that time or at any time subsequent.

Thereafter, a hearing was had before the United States District Judges Pratt and Thornton, on January 7, 1975, determining that the Chapter X proceedings should be terminated, the debtor having made no progress in putting forth a plan; and on February 27, 1975, an order of adjudication and referral was entered

by these two judges, in which Atlas Concrete Pipe was adjudicated a bankrupt and the proceedings referred to the Honorable Harold H. Bobier, Judge in Bankruptcy, for liquidation (R60).

In view of the adjudication and the termination of the Chapter X proceedings, petitioner promptly, on March 11, 1975, filed a motion to dismiss the suit brought by the trustee under the Chapter X proceedings which the bankruptcy receiver sought to continue before the Bankruptcy Judge.

A separate receiver having been appointed by the Bankruptcy Judge on April 8, 1975, an order was entered allowing Harold Morrison to resign as trustee in the Chapter X proceedings (R69). No substitution of the receiver for the trustee in the suit pending had ever been made or requested.

On May 6, 1975, a hearing was had on petitioner's motion to dismiss (R74), and this

motion was denied by Judge Bobier on that date with an opinion rendered from the bench. (R86)

THE RULINGS BELOW

The Bankruptcy Judge's specific ruling in his opinion delivered from the bench on May 6, 1975 is unclear. In denying petitioner's motion to dismiss he refers to the rule established in Harrison vs. Chamberlain, 271 U.S. 191, that it was incumbent upon the Bankruptcy Court in such matters to determine whether there is in fact an adverse claim or whether the claim to adversity is merely colorable (it may be noted parenthetically that no hearing to determine adversity was ever conducted) and further enunciates the proposition that "if a challenge to jurisdiction is made asserting adverse position, it must be specifically stated and general allegations will not be sufficient to oust the Bankruptcy Court of jurisdiction. For these various reasons, I will dismiss the petition." (R 81)

On appeal the District Court affirmed the Bankruptcy Judge's decision, ruling specifically that "if a chose in action is within the estate of the bankrupt, Section 2 (a) (7) does not limit the Bankruptcy Court to determining controversies but also empowers the court to collect the debt." (Appendix A, p 68). The District Court further ruled that petitioner's filing of an answer and counter claim in the District Court civil suit commenced against it by the Chapter X trustee constituted a consent to the jurisdiction of the Bankruptcy Court if consent were needed. (Appendix A, p 70).

The United States Court of Appeals affirmed the decision of the District Court holding that since the District Court in the reorganization proceedings had jurisdiction to collect the accounts receivable of the debtor, by the orders of reference of June 28, 1974 and November 12, 1974 this jurisdiction was properly trans-

ferred to and conferred upon Bankruptcy Judge Bobier then and thereafter in the subsequently ensuing straight bankruptcy proceeding; and that by answering the civil District Court complaint served upon it by the Chapter X trustee on November 13, 1974, petitioner consented to the jurisdiction of the Bankruptcy Judge then and in the subsequently ensuing bankruptcy proceedings (although it had no notice or knowledge of either order of reference). (Appendix A, pp. 48-62).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should be Granted to Resolve Conflicts in Principle Among the Lower Courts

(a) In a clear and consistent line of decisions based upon the present Bankruptcy Act and its predecessors, the United States Courts of Appeals, with the exception of the Sixth Circuit, as well

as the United States Supreme Court peripherially in Williams vs. Austrian, 331 U.S. 642, 91 L ed 1718, 67 SC 1443 (1946) have held that the Bankruptcy Court does not have jurisdiction in an action by a trustee to obtain a money judgment against an alleged debtor of the bankrupt or to "enforce liability against the debtor" and that such a debtor is deemed to have "the status of adverse claimant and entitled to have his liability determined by ordinary action or plenary suit." Remington, Secs. 2372 and 2172. Re 671 Prospect Avenue Holding Corp., 118 F 2d 453 (C.A. 1 1941); In Re Reading Engineering, Inc., 60 F 2d 42 (C.A. 1 1932); Re Roman, 23 F 2d 556 (C.A. NY 1928); Re Zotti, 186 F 84 (C.A. NY 1911); Re Boston-Cerillos Mines Corp., 206 F 794 (DC NM 1913); Re Howe Mgf. Co., 193 F 524 (DC SC 1903); Re Zotti, 178 F 304 (DC NY 1910).

The principles involved here are succinctly

stated in In re Ballou, 215 F 810 (Kentucky, 1914) D.C. E.D.) where the court held that "a summary proceeding is proper only to effect the transfer of the physical possession of property from the bankrupt or a third party to the trustee. It is not proper to enforce the performance by a third person of a contract with the bankrupt. An undisputed debt due the bankrupt cannot be collected by a summary proceeding. It can only be collected by an independent suit brought by the trustee against the debtor in a court of competent jurisdiction."

The same position was elaborated on by Judge Learned Hand in In re Roman, 23 F 2d 556 (C.A. NY 1928). Here a syndicate had refused payment of an alleged indebtedness to a trustee in bankruptcy. The court reasoned:

> "Nobody can maintain that, before the payment is made, the bankrupt has any property in the syndicate's hands. Even though its refusal were no better

than colorable, its property remained its own; it had only broken its promise, and, like any other promisor, was liable to an action for damages . . . It would not be permissible to collect even a bank deposit due a bankrupt by these means. So far as possession can be imputed to such property at all, it is confined to the rights of the bankrupt to enforce the promise. The trustee must proceed as the bankrupt must have proceeded, in a court having competent jurisdiction in such causes."

Similarly in the Third Circuit, In re Standard Gas & Electric Co., 119 F 2d 658 (C.A. 3):

"In a broad sense a claim by a debtor against a third person is property of the debtor . . . But it is a species of property which may only be realized upon for the benefit of the debtor and its creditors by the successful prosecution of a plenary suit against the third person involved."

The Court of Appeals decisions in the Sixth Circuit are in sharp contradiction to the theory enunciated in the cases of the other Circuits, and the decision reached by the Sixth Circuit in the instant case derives from the other rulings in the Circuit, notably In re Wiltse Brothers Corporation, 357 F 2d 190 (1966) and Willyerd vs.

Buildex Company, 463 F 2d 996 (1972). In the former case the Court of Appeals, in ruling that the Bankruptcy Court had jurisdiction to compel payment from a debtor of a debt owed the bankrupt, confused the question of the Bankruptcy Court's jurisdiction over a chose in action for the purposes of determining controversies in respect to it with its jurisdiction over the debtor of the account in an action to collect the same. Moreover, it wrongly applied the standards of jurisdiction applicable to persons claiming specific property adverse to the trustee rather than those applicable to an account debtor. In the Willyerd case, although the final decision was that in this instance the Bankruptcy Court did not have jurisdiction, the court wrongly applied to an account debtor the tests appropriate to an adverse claimant.

The ruling of the Court of Appeals in the

instant case evidences this underlying confusion that has plagued the question of Bankruptcy Court jurisdiction in the Sixth Circuit. In treating a "chose in action" there are two things involved; first, the chose in action itself, and second, the assets or money required to satisfy the chose in action. If there are no specific assets set aside by lien or trust for the satisfaction of the chose in action there is no "specific property" over which the Bankruptcy Court can have either actual or constructive possession, albeit it clearly has constructive possession of the chose in action as such. And the rule that the Bankruptcy Court may determine the rights to property within its possession has, contrary to the District Court's indication in the instant case, never been held inapplicable to "choses in action" as such. The Bankruptcy Court may clearly determine questions of title, encumbrance and priority in relation to such a chose in action.

But it may not render a personal judgment against the account debtor where there is no specific property from which the debt or account is to be satisfied. This distinction was stated succinctly in a 1975 Ohio case (which did not reach the Court of Appeals):

> "The bankruptcy court has summary jurisdiction to adjudicate title to a cause of action, but it does not, absent consent, have summary jurisdiction to enforce the chose in action against the party liable therefor." In re Warren, 387 F Supp. 1395 (D.C.S.D. Ohio 1975).

The confusion inherent in this problem of choses in action has nowhere been better delineated than in In re Lehigh and Hudson River Railway Company, 468 F 2d 430 (C.A. 1 1972):

> "(1,2) At the outset, it is well to correct a misconception resulting from Lehigh's reliance on the statement in 2 Collier, Bankruptcy § 23.05 (4), at 485 (1971), cited by the District Court:
>
> 'Where the character of the property is such that it is not capable of tangible

or actual physical custody, constructive possession will suffice to confer summary jurisdiction upon the bankruptcy court regarding such property.'

The discussion makes clear that this statement refers to conflicting claims of the bankrupt and others to the ownership of such intangibles; in such cases the rule with respect to choses in action is the same as that with respect to tangible property. But, as is explained in the final sentence of the subsection, id. at 489-90, and the cases cited in fn. 33, the bankruptcy court does not have summary jurisdiction to enforce a chose in action against the bankrupt's obligor, even when the bankrupt's rights seem clear. Judge Learned Hand made the distinction, with his customary clarity, in In re Roman, 23 F 2d 556 (2 Cir. 1928)."

This confusion can be further illustrated by examining the quotation from Colliers, 14th Ed., Volume 2, Section 23.05 (4), which is also cited on page 68 of the District Court opinion, Morrison vs. Rocco Ferrera Co., Inc. 409 Fed Supp. 1364; (Ed Mich 1975):

> "Where the intangible consists of a chose in action, such as a debt or a contract claim, such intangible may be

> said to be in the constructive possession of the bankruptcy court so as to enable the court summarily to determine the rights of various claimants to the chose in action, if the bankrupt remained in the legal owner up to the time of filing of the petition." (footnote omitted)

It is clear that the District Court was of the opinion that the account debtor of the bankrupt is in a position which is the equivalent of an adverse claiment. This logic is false. If the account debtor of the bankrupt were truly an adverse claiment, it would mean that he also claimed ownership or the right to possession of the chose in action. In essence, the debtor of the bankrupt would be claiming the right to sue itself for the amount owed under the account. In actuality, what is meant by referring to adverse claimant's to a chose in action is more akin to disputes between an assignor and assignee or vendor or vendee of a chose in action and not the dispute between a debtor of the bankrupt and the bankrupt.

Some commentators have added to the confusion (such as Remington on Bankruptcy, Sections 2172 and 2372 which are cited supra.) by using language equating adverse claimants and account debtors of the bankrupt. Such equations, however, are made only with reference to the fact that, at least in the absence of consent, neither an adverse claimant nor an account debtor can be subjected to bankruptcy jurisdiction. In this sense a debtor of the bankrupt shares the same status as a bona fide adverse claimant. But the analogy ends here. The adverse claimant asserts a right to specific property, tangible or intangible, which may or may not be within the jurisdiction of the court. The account debtor, absent any asserted lien, has no claim to specific property and the Bankruptcy Court cannot, even if his position be merely colorable, exercise jurisdiction over his person or separate estate, at least without his consent. Furthermore,

this difference between adverse claimants and account debtors is recognized in Williams vs. Austrian, 331 US 642, 91 L ed 1718 SC 1443 (1916), where the court carefully utilizes disjunctives so as to differentiate as between adverse claimants and account debtors of the bankrupt and also between cases relating to property adversely held and suits upon choses in action belonging to the bankrupt's estate.

As a result of the foregoing confusion the Sixth Circuit in Morrison vs. Rocco Ferrera & Co., Inc., 409 F Supp. 1364 (E.D. Mich 1975); In the Matter of Wiltse Brothers Corporation, 357 F 2d 190 (1966); Willyerd vs. Buildex Company, 463 F 2d 966 (1972), is in conflict with the majority holding in the United States as represented by In re Roman, 23 F 2d 556 (C.A. 1 1928); In re Borok, 50 F 2d 75 (C.A. 2 1931); In re Lehigh vs. Hudson River Railway Co., 468 F 2d 430 (C.A. 1 1972); In re Standard Gas & Electric

Co., 119 F 2d (C.A. 3). These cases hold that a Bankruptcy Court's jurisdiction over a chose in action does not, at least absent consent of the account debtor, confer upon the court personal jurisdiction to collect the debt by way of personal judgment against the debtor.

(b) It is undisputed that Section 23 [11 USC 46] does not apply in reorganization proceedings. However, when reorganization proceedings are terminated, and the debtor adjudged a bankrupt, the provisions of this section do apply, as noted in In Re Cuyahoga Finance Company, 126 F 2d 18 (C.A. 6 1943):

> "One of the purposes of the statute was the enlargement of the jurisdiction of the court. The restrictions of Section 23, 11 U.S.C.A. § 46 were abrogated unless the proceeding degenerated into ordinary bankruptcy."

Further support for this contention is found in Section 101 [11 USC 501] of the Bankruptcy Act:

> "The provisions of this chapter shall apply exclusively to proceedings under this chapter."

Section 102 [11 USC 502] of the Bankruptcy Act provides that Section 23 [11 USC 46] of the Bankruptcy Act does not apply to reorganization proceedings:

> "The provisions of chapters 1 to 7, inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: Provided, however, That section 46, subdivisions (h) and (n) of section 93, section 104, and subdivision (f) of section 110 of this title, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters 1 to 7, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors" and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 528 of this title, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 527 or 528 of this title except where an adjudication had previously been entered."
> [Italics supplied.]

Consequently, the abrogation of Section 23 does not apply to a subsequent bankruptcy. It is clear that the abrogation of Section 23 of the Bankruptcy Act is effective for reorganization proceedings only and that upon their termination and subsequent bankruptcy adjudication, Section 23 of the Bankruptcy Act once again becomes effective.

In addition, it is clear that the Bankruptcy Act mandates in Section 236 (a) [11 USC 636(2)] that when a reorganization proceeding terminates and the debtor is adjudged a bankrupt, the bankrupt proceedings must be carried our pursuant to the provisions of the Bankruptcy Act:

> "Where the petition was filed under Section 528 of this title, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing the bankruptcy be proceeded with pursuant to the provisions of this act, or dismissing the proceedings under this chapter, as in

> the opinion of the judge may be in the interests of the creditors and stockholders."

Section 23 of the Bankruptcy Act is part of the provisions of the act which apply in bankruptcy. It is, therefore, clear that when Section 102 [11 USC 502] of the Bankruptcy Act provides that "the provisions of chapters 1 to 7, inclusive, of this title shall insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: Provided, however, That section 46, subdivisions (h) and (n) of section 93, section 104, and subdivision (f) of section 110 of this title, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters 1 to 7, inclusive," it should be construed to require that any such bankruptcy ordered be proceeded with pursuant to the provisions of chapters 1 to 7

inclusive, which would include Section 23 of the Bankruptcy Act.

The foregoing takes on special significance when read in conjunction with Section 238 (a) (1) [11 USC 638] :

> "(a) Upon the entry of an order directing that bankruptcy be proceeded with - -
>
> (1) where the petition was filed under section 527 of this title, the bankruptcy proceeding shall be deemed reinstated and shall thereafter be conducted, so far as possible, as if the petition under this chapter had not been filed; or where the petition was filed under section 528 of this title, the proceeding shall thereafter be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved." [Italics supplied.]

This clearly provides that the proceedings should be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed.

The policy of Section 238 is enunciated In re Atlas Sewing Centers, Inc., 437 F 2d 607 (C.A. 5 1971):

> "To paraphrase a sometime popular refrain, what the Government ignores are the four little words "so far as possible". The policy of the statute may be assumed to roll the clock back. But the condition which is an integral part of such policy has to reckon with two things. The first is that on occasion that passage of time and the occurrence of events simply make it physically and operationally impossible to recapture the past or to recreate the former status. Second, and of equal if not greater importance, time and circumstance may well have made that which is theoretically impossible to be fundamentally inequitable. In either or both of such events it is left for the Bankruptcy Court to exercise its great equitable resources to accomodate these competing factors."

In the present case, if there is to be a true "roll back" pursuant to Section 238 [11 USC 638] of the Bankruptcy Act, it will be necessary to invoke Section 23 of the Bankruptcy Act. Such invocation is consistent with In re Atlas, 437 F 2d 607 (C.A. 5 1971) and In re Cuyahoga,

126 F 2d 18 (C.A. 6 1943). It would not be inequitable nor would it be mechanically impossible to do so in the present case as the trustee in bankruptcy would merely have to proceed in another forum rather than proceed to trial before the bankruptcy judge. In fact, it would be inequitable not to apply Section 23 of the Bankruptcy Act, since, as will be elaborated on in a subsequent section of this argument, petitioner, when it filed its answer did so merely as a party defendant to a District Court action and there is a great potential for prejudice when a bankruptcy judge who also has administrative duties concerning the estate presides over controversies involving the estate.

Furthermore, even if it were to incorrectly assumed that the petitioner consented to the referee's jurisdiction in the reorganization proceedings by filing his answer to the complaint, it still should not be construed as consent to the

referee's jurisdiction in straight bankruptcy. As noted earlier Section 23 of the Bankruptcy Act applies when a reorganization degenerates into bankruptcy proceedings. As a result of the Court of Appeals holding in the instant case, the Sixth Circuit is clearly out of line with In re Atlas, 437 F 2d 607 (C.A. 5 1971), and its own earlier decision In re Cuyahoga, 126 F 2d 18 (C.A. 1943) whether a consent to jurisdiction is implied or not.

If Section 23 of the Bankruptcy Act is to be applied to the instant case, it would clearly mandate that this action be maintained in a court where the bankrupt might have brought them had proceedings not been brought under this title absent thepetitioner's consent. If the reorganization proceedings had not been brought, it is clear that neither the District Court nor the bankruptcy judge in straight bankruptcy would have had jurisdiction over this matter,

at least in the absence of consent. Therefore, the present suit is not properly before the bankruptcy judge in straight bankruptcy as the petitioner has never consented either expressly or implicitly to the bankruptcy judge's jurisdiction in either the reorganization proceedings nor the subsequent straight bankruptcy proceedings.

II.

The inferring of consent to Bankruptcy Court jurisdiction by the filing of an answer by defendant in a civil District Court suit is contrary to the provisions of the Bankruptcy Act (Sec. 23) and the due process clause of the Fifth Amendment.

The Court of Appeals has ruled (Appendix A, pp. 48-62) that by filing an answer and counter claim in the District Court suit, properly brought by the trustee in the Chapter X proceedings, petitioner consented to the juris-

diction of the Bankruptcy Court then and in the ensuing straight bankruptcy.

There is no question, in the case at hand, that petitioner at no time expressly consented to the jurisdiction of the Bankruptcy Court in the reorganization proceedings or the bankruptcy proceedings. However, it has been held that filing an answer in a proceedings in a Bankruptcy Court without objection to the jurisdiction may be construed as a consent to this jurisdiction. The new Rules of Bankruptcy go further than this in providing in Rule 915 that failure to object "by a timely motion or answer, whichever is first served."

Petitioner, in the instant case, did in fact file an answer to the trustee's civil complaint in the United States District Court on November 13, 1974, without objecting to the jurisdiction, but this action cannot here be construed as a consent to Bankruptcy Court juris-

diction for the following reasons.

The Atlas Concrete Pipe proceedings was at that time a proceedings under Chapter X for reorganization and the United States District Court in a reorganization proceedings, unlike a Bankruptcy Court in ordinary bankruptcy, does have jurisdiction of such a suit to collect a receivable of the debtor, and accordingly an objection to jurisdiction would not lie and petitioner was compelled to answer or be defaulted. It should be kept in mind that at this stage in the proceedings, petitioner had only been served with a summons and complaint for the District Court suit brought pursuant to the reorganization. Petitioner had no notice that a bankruptcy referee or judge was involved. As soon as the Chapter X proceeding was terminated and straight bankruptcy ensued (February 27, 1975), petitioner filed its motion to dismiss for want of proper jurisdiction (March 11,

1975). Petitioner could not have acted more promptly in this regard.

The United States District Court, in a Chapter X proceedings clearly has jurisdiction of such a suit. Beside the powers and jurisdiction conferred on the court in ordinary bankruptcy proceedings, its jurisdiction is amplified by Section 115 /¯ 11 USC 515 ¯/ and Section 102 /¯ 11 USC 502 ¯/ of the Bankruptcy Act.

Section 115 of the Bankruptcy Act confers on a Chapter X court in addition to the ordinary powers of a Bankruptcy Court "all the powers . . . which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature," including the jurisdiction over the recovery of debts owed the debtor exercisable either in the primary suit or

by separate plenary suit brought in the same District Court even if no separate grounds exist for federal jurisdiction. Remington, Sec. 4355; Warder vs. Brady, 115 F 2d 89 (C.A. W Va, 1940); Goldmen vs. Staten Island, 98 F 2d 496, (CA NY, 1938); Oils, Inc. vs. Blankenship, 145 F 2d 354 (CA Okla, 1944); Union Guardian Trust Co. vs. Detroit Trust Co., 72 F 2d 120 (CA Mich, 1934).

Separate and perhaps still clearer grounds for this jurisdiction exist under the provisions of Section 102 [11 USC 502] of the Bankruptcy Act. This section expressly abrogates the operation of Section 23 (b) [11 USC 46] of the Bankruptcy Act in Chapter X proceedings, thus conferring on United States courts that jurisdiction precluded by Section 23 of the Bankruptcy Act in ordinary bankruptcy. As summarized by Remington:

"The abrogation of the effect of Sec. 23 conferred a major extension of jurisdiction on Chapter X courts. The trustee can institute an action in the Chapter X court against an adverse claimant without the defendants' consent and even if usual jurisdictional requirements for suit in the Federal District Court do not exist." Remington, Sec. 4353.

The Supreme Court of the United States reached this conclusion in Williams vs. Austrian, cited above.

Since the United States District Court in the Chapter X proceedings did have jurisdiction of a suit brought for collection of a debt allegedly due the debtor corporation, petitioner was compelled to file an answer, and the filing of this answer cannot be construed as implying consent to the jurisdiction of the Bankruptcy Court in the ensuing bankruptcy proceedings. To hold otherwise would permit parties

to misuse the Chapter X provisions of the Bankruptcy Act to acquire Bankruptcy Court jurisdiction over parties where otherwise this jurisdiction would not exist, and in cases where, as in the present case, there was no genuine attempt to reorganize. It will be recalled that the reorganization proceedings were commenced here immediately after the debtor's attempt to bring suit against petitioner in the Circuit Court for Genesee County had been met by a motion to dismiss for improper venue (the proper venue lying in Wayne County). Surely it was never the intention of the drafters of Chapter X that it should be used to evade the ordinary state and federal rules for jurisdiction and venue or provide a collection agency for the accounts of defunct corporations.

The Court of Appeals refers to an order of reference entered by Judge Thomas P.

Thornton on June 26, 1974 referring the matter of disputed accounts receivable, presumably including that of petitioner to the Honorable Harold H. Bobier, Bankruptcy Judge, to "take what action is necessary to resolve such accounts receivable either through settlement and/or whatever litigation is necessary"; and to a second order of reference entered by District Judge Cornelia G. Kennedy on November 12, 1974, encompassing the entire reorganization proceedings excepting such duties as are " reserved by statute exclusively to the District Judge." (Appendix A, pp.49-53)

The theory that a party is deemed to have consented to the jurisdiction of the Bankruptcy Court (now incorporated in Bankruptcy Court Rule No. 915) when it files an answer without objecting to this jurisdiction is based on implication. But in the instant case petitioner, when it filed its answer, and for some

time thereafter, was unaware that such order of reference had been entered or that the Bankruptcy Court or Bankruptcy Judge, as a subordinate entity distinguished from the United States District Court, was in any way involved. The pleading with which it was served on October of 1974 was a civil and plenary District Court complaint filed on September 9, 1974, and although reference is made in that complaint to the Chapter X proceedings(indeed it is necessary to identify the plaintiff as a Chapter X trustee) absolutely no reference is made therein to the bankruptcy judge or Bankruptcy Court as such. As the record clearly shows, petitioner was not then, and has never been served with a copy of the order of reference of June 28, 1974, nor ever notified thereof, nor was it a party to the proceedings when that order was entered. There is nothing in the complaint that would alert petitioner to the existence

of such an order or to the involvement of the Bankruptcy Court as such. When petitioner filed its answer and counterclaim on November 13, 1974 it had no reason to suppose that it was doing anything more than filing an answer to a complaint for damages in the United States District Court which, after thorough research, it had determined had proper jurisdiction of the case. A defendant served with a complaint answers the pleadings and process as it is served upon him and is not charged with omniscence as to what the plaintiff may have accomplished ex parte long before the suit was filed against him. To charge him with this knowledge he would have to have been served with a copy of the order of reference or at least a notice of its prior entry. As it was this order was buried as entry number 53 on the voluminous docket calendar of the Chapter X proceedings, among almost 100 other entries dealing with

multifarious other matters in connection with the general administration of the Chapter X proceedings.

The second order of reference (Judge Kennedy's) was entered on November 12, 1974, shortly after petitioner was served with the complaint and one day before petitioner filed its answer. Again, this order was entered ex parte without notice to petitioner nor was petitioner at any time subsequent either served with a copy of the order or notified of its entry, although it was at this time presumably a party in interest.

It would be distorting all notions of reasonableness and fairness and a clear violation of the due process clause of the Fifth Amendment to imply from these facts that petitioner by filing its answer to a District Court complaint indictative of a plenary civil suit in the District Court thereby consented to the present or subsequent jurisdiction of the Bankruptcy Court or

bankruptcy judge.

16 Am Jur 2d 963, Sec. 560, Constitutional Law, spells out the applicable principle that "one of the essentials of due process is notice," and this is supported by extensive authority: Anderson Nat. Bank v Luckett, 321 US 233, 88 L ed 692, 64 S Ct 599, 151 ALR 824; Voeller v. Neilston Warehouse Co., 311 US 531, 85 L ed 322, 61 S Ct 376; Snyder v. Massachusetts, 291 US 97, 78 L ed 674, 54 S Ct 330, 90 ALR 575.

Furthermore, it is a general proposition of law that a person to be affected by an order is entitled to notice, 16 Am Jur 2d 969, Section 563, Constitutional Law. This notice should be reasonably calculated to inform the person of what he is being subjected to: Convey v Somers, 351 US 141, 100 L ed 1021, 76 S Ct 724; Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L ed 865, 70 S Ct 652. It

would be contrary to this principle to hold that petitioner, in being served with a civil suit summons and complaint in the District Court had any notice of the previous orders of reference to the bankruptcy judge. No attempt was made whatsoever to inform the petttioner of the orders of reference. It would therefore violate the due process clause to bind the petitioner to the effects of said orders (whatever they be) by virtue of its answer to the civil complaint.

The inequity of the Appeals Court's decision in the instant case is highlighted by a recent article in the Detroit Lawyer: Vol 45, No. 4, p. 21, April, 1977:

> "The Rules of Bankruptcy Procedure were an attempt to establish uniform procedure in all bankruptcy cases. Their adoption had little or nothing to do with the reluctance of parties to submit to the bankruptcy court's jurisdiction. Instead, this reluctance is based on the present structure of the bankruptcy court.

The Report of the Commission on Bankruptcy Laws of the United States states that,

> 'the Commission is convinced that the referee's participation in administrative aspects of bankruptcy proceedings tends to impair the litigant's confidence in the impartiality of the tribunal's decision. In particular, adversaries of the trustee in bankruptcy tend to doubt that the referee who appointed the trustee can insulate himself from at least a suspicion of partiality when he may have previously been involved . . . in actions regarding the same estate . . .'

Until the Bankruptcy Act is restructured to remove administrative functions from the bankruptcy judge, this reluctance to have matters determined in the bankruptcy court will continue."

It is this potential for prejudice which petitioner seeks to avoid. The due process violation clearly should not be upheld so as to allow the petitioner to be placed in such a situation. But beyond the due process implications of the instant case, the Sixth Circuit rulings in this and other cases cited,

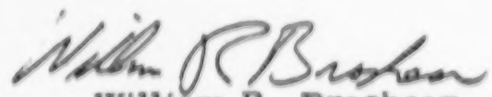
and in direct opposition to the holdings in other Circuits, have in the matter of choses in action improperly expanded the jurisdiction of the bankruptcy judges in this Circuit, with the result that parties involved in large and complex contract suits (in the instant case a suit for $110,608.87 with a counterclaim for $293,000.00) are being forced to try their cases in this unsuitable forum.

CONCLUSION

WHEREFORE, petitioner prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Court of Appeals for the Sixth Circuit in Harold Morrison, Trustee of Atlas Concrete Pipe, Inc. and/or Atlas Concrete Conduit, Inc. vs. Rocco Ferrera & Co. In the event that the petition is granted, petitioner prays that the judgment of the court below be reversed and the complaint against petitioner dismissed; or, in the alternative, if

the court finds that the jurisdiction once properly laid in the United States District Court for the Eastern District of Michigan continued even after the jurisdictional requirements (the pendency of a Chapter X proceedings) ceased, that the case be remanded to the District Court as distinguished from the Bankruptcy Court or bankruptcy judge for trial.

September 25, 1977 Respectfully submitted,



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APPENDIX A

OPINIONS BELOW

No. 76-1165

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In the Matter of:

HAROLD MORRISON, TRUSTEE OF ATLAS CONCRETE PIPE, INC., and/or ATLAS CONCRETE CONDUIT, INC.,

Plaintiff and Counter-Defendant, Appellee,

v.

ROCCO FERRERA & Co., a Michigan Corporation,

Defendant and Counter-Plaintiff, Appellant.

APPEAL from the United States District Court for Eastern District of Michigan.

Decided and Filed May 6, 1977.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and SILER, District Judge.*

PHILLIPS, Chief Judge. The trustee in a Chapter X reorganization proceeding under the bankruptcy act filed an action in the United States District Court to recover an account receivable. The District Court referred the matter to a bankruptcy judge. The defendant thereupon filed an answer and counterclaim for breach of contract. Thereafter the Chapter X

* Honorable Eugene E. Siler, Jr., Judge, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

proceeding was terminated and the Chapter X petitioner was adjudged a bankrupt. The question presented on this appeal is whether the bankruptcy judge has continuing jurisdiction over the original action.

In an opinion reported as *Morrison* v. *Rocco Ferrera Co., Inc.*, 409 F.Supp. 1364 (E.D. Mich. 1975), District Judge James Harvey answered this question in the affirmative. We affirm.

I.

On February 22, 1974, Atlas Concrete Pipe, Inc. (Atlas), plaintiff-appellee, filed an action in the State courts of Michigan against Rocco Ferrera & Co., Inc. (Rocco), defendant-appellant, to recover accounts receivable allegedly owed to Atlas in the amount of $110,608.87. This State court action did not proceed to trial.

On March 15, 1974, Atlas filed a petition for reorganization under Chapter X of the bankruptcy act, 11 U.S.C. § 501 *et seq.*, in the United States District Court for the Eastern District of Michigan. By order dated April 18, 1974, the District Court approved Atlas' Chapter X petition and appointed Harold Morrison reorganization trustee. The approval of the Chapter X petition was followed on June 28, 1974, with an order of the District Court regarding the accounts receivable that were the subject of the Michigan State court action between Atlas and Rocco. This order of June 28, signed by Senior District Judge Thomas P. Thornton during the illness of the late District Judge Stephen J. Roth, referred the entire accounts receivable matter to a bankruptcy judge, Harold H. Bobier, in the following terms:

> Trustee herein having issued show cause to the existing accounts receivable of the debtors, Atlas Concrete Pipe, Inc. and/or Atlas Concrete Conduit, Inc. and hearing having been heard before this Court; and it appearing to this Court that many matters are seriously contested and that it will be necessary that these matters in dispute

be referred to a tribunal of competent jurisdiction, NOW, THEREFORE,

IT IS HEREBY ORDERED that the Trustee be directed to issue the necessary pleadings required to initiate proceedings against the accounts receivable which are in dispute and that said matters in dispute be referred to the Honorable Harold H. Bobier, Judge in Bankruptcy, Federal Building, Flint, Michigan.

IT IS FURTHER ORDERED that the Honorable Harold H. Bobier shall take what action is necessary to resolve said accounts receivable either through settlement and/or whatever litigation is necessary.

On September 9, 1974, Harold Morrison, trustee under Chapter X for the estate of Atlas Concrete, filed a complaint in the United States District Court for the Eastern District of Michigan against Rocco for recovery of the indebtedness allegedly due and represented by the accounts receivable. This complaint stated that the suit was a "suit of a civil nature" and that jurisdiction "has been vested in the Federal District Court" incident to the Chapter X reorganization pending in that court. On November 12, 1974, District Judge Cornelia G. Kennedy, noting that "numerous creditors have appeared . . . and various actions are pending" in the Atlas Concrete Chapter X proceeding in the District Court, ordered the entire Atlas reorganization referred to Bankruptcy Judge Bobier, excepting such duties as are "reserved by statute exclusively to the District Judge . . . ."

On November 13, 1974, one day after District Judge Kennedy's general order of reference to Bankruptcy Judge Bobier, and more than four months after Judge Thornton's limited reference of the accounts receivable matter to Bankruptcy Judge Bobier, Rocco filed an answer in the District Court to the complaint filed by trustee Morrison. Rocco's answer set forth a general denial of the claims against it and then stated as follows:

1. Defendant admits that Plaintiff agreed to sell and deliver to Defendant certain inventory and merchandise prior to January 23, 1974 as set forth in Paragraph Four (4) of Plaintiff's Complaint, and Defendant further admits that certain inventory and merchandise were furnished Defendant but Defendant alleges that Plaintiff did not fulfill the terms of the agreement to furnish said inventory and/or merchandise in that Plaintiff did not furnish the materials agreed upon nor was said merchandise and/or inventory furnished when and in the manner agreed upon.

2. That as a result of Plaintiff's failure to fulfill the terms of the agreement as set forth above, Defendant suffered damages for which Plaintiff is indebted to Defendant which damages resulting from said breach of the agreement and failure of the Plaintiff to perform as agreed amount to Fifteen Thousand ($15,000.00) Dollars.

Rocco's answer went on to state a counterclaim for damages for breach of contract against Atlas in a total amount of $293,000 plus interest, costs and attorneys fees. There was no denial or challenge of any kind in Rocco's answer to the jurisdiction of the District Court or of the bankruptcy judge sitting by reference from the District Court.

Atlas was unable to reverse its deteriorating financial condition during the Chapter X proceedings. By December 1974 it became clear to the District Court that the Chapter X proceeding should be terminated, followed by straight bankruptcy and liquidation. The District Court conducted a show cause hearing on February 11, 1975, and on February 27 District Judges Thornton and Philip Pratt issued a joint order of adjudication and referral terminating the Chapter X proceeding, adjudicating Atlas a bankrupt, and further stating as follows (as amended by order of Judge Pratt dated March 12, 1975):

IT IS FURTHER ORDERED that this matter be referred to the Bankruptcy Court, Eastern District, North-

ern Division, before the Honorable Harold H. Bobier, Judge in Bankruptcy, for further proceedings under and consistent with the Bankruptcy Act.

IT IS FURTHER ORDERED that the Honorable Harold H. Bobier proceed immediately with the orderly liquidation of all assets, the collection of accounts receivable and whatever determinations are necessary so far as the rights of all parties hereto and the equities that exist in the course of said liquidation and/or such other actions as are authorized under the Bankruptcy Act.

On March 11, 1975, Rocco filed a motion to dismiss the complaint filed against it by Atlas and Harold Morrison, the reorganization trustee, on the ground that the court lacked jurisdiction over the controversy. In support of its motion, Rocco argued that the trustee appointed under the Chapter X proceedings is no longer a party in interest and the action does not lie in the U.S. District Court because there is no longer a pending Chapter X proceeding in the District Court. Rocco further stated in its motion that the debtor, Atlas, has been adjudicated a bankrupt and thus, under the provisions of § 23(b)[1] of the bankruptcy act the trustee for Atlas was required to prosecute the underlying claim on the accounts receivable in the courts "where the Bankrupt might have

[1] Section 23 of the Bankruptcy Act, 11 U.S.C. § 46, provides as follows:

§ 23. Jurisdiction of United States and State Courts.

a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

brought or prosecuted them, which in this case would be the appropriate State court of the State of Michigan."

On March 17, 1975, Bankruptcy Judge Harold H. Bobier ordered the appointment of David Cuvrell as receiver in bankruptcy for the estate of Atlas Concrete Pipe, Inc. On April 8, District Judge James Harvey entered an order authorizing Harold Morrison to resign as trustee for Atlas in the terminated Chapter X reorganization proceeding.

On May 6, 1975, Rocco's motion to dismiss the District Court complaint filed against it by trustee Morrison and Atlas came on for hearing before Bankruptcy Judge Bobier, who ruled from the bench that he had jurisdiction to resolve the accounts receivable matter pursuant to the general referral to him by the District Court.

Rocco appealed the finding of jurisdiction by the bankduptcy judge to the District Court. On November 17, 1975, District Judge Harvey affirmed the determination of Bankruptcy Judge Bobier in the opinion reported at 409 F.Supp. 1364. Rocco has appealed to this court.

II.

The jurisdictional issue on this appeal is composed of these three questions:

(1) Did the United States District Court sitting as a reorganization court under Chapter X of the bankruptcy act have jurisdiction over the action filed by Atlas to recover accounts receivable allegedly owed by Rocco to Atlas?

(2) Did Bankruptcy Judge Bobier acquire jurisdiction to determine the controversy between Atlas and Rocco by virtue of the reference from the District Court or as a result of any action or inaction by the parties?

(3) After the termination of the Chapter X proceeding and the appointment of a new trustee for the debtor, did the District Court or the bankruptcy judge sitting by reference

from the District Court have jurisdiction to continue with the resolution of the controversy between Atlas and Rocco?

(A) Jurisdiction of the District Court

The original Chapter X petition was filed by Atlas in the District Court on March 15, 1974. It appears to this court to be beyond dispute that, from and after the approval of the Chapter X petition by the reorganization court (i.e., the District Court sitting as a reorganization court under Chapter X), the District Court had jurisdiction to adjudicate the account receivable action between Atlas and Rocco. Section 2a(7)[2] of the Bankruptcy Act, incorporated into Chapter X via § 114,[3] and not limited by the provisions of § 23(b)[4] because of the language of § 102[5] gave the District Court

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[2] Section 2a(7) of the bankruptcy act grants to "courts of bankruptcy" [which includes by definition under § 1(10) of the Act United States district courts] such jurisdiction at law and equity as will enable them to "Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, ..."

[3] Section 114 of the bankruptcy act incorporates the general grant of jurisdiction contained in § 2a(7) into the framework of reorganization under Chapter X, to the extent that this incorporation is not inconsistent with the separate provisions of Chapter X:

> SEC. 114. Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

[4] Section 23, quoted in n. 1, is the key exception to federal court jurisdiction acknowledged in the "except as herein otherwise provided" language of § 2a(7). In straight bankruptcy proceedings, § 23 is of much significance in determining the proper forum for actions by trustees and receivers. *See* 2 COLLIER ¶ 23.01 *et seq.* (14th ed.). Section 23 is not applicable to Chapter X proceedings, *See* n. 5, *infra*.

[5] Section 102 reads in part:

> SEC. 102. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23, subsections h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive.

sitting as a reorganization court jurisdiction over the subject matter of the suit begun in the District Court by Atlas. The Supreme Court has so held. *See Williams* v. *Austrian*, 331 U.S. 642 (1947). *See also In Re Cuyahoga Finance Co.*, 136 F.2d 18 (6th Cir. 1943).

The District Court, however, referred the accounts receivable matter to Bankruptcy Judge Bobier by specific orders dated June 28, 1974, and in the general reference of the Chapter X to Judge Bobier dated November 12, 1974. Thus at the time of the filing of Rocco's answer to the accounts receivable complaint on November 13, 1974, the matter was actually pending by reference before Bankruptcy Judge Bobier.

(B) Jurisdiction after Reference by Reorganization Court to Bankruptcy Judge

Section 117 of the bankruptcy act gives the District Court sitting as a reorganization court under Chapter X broad powers to refer parts or all of the reorganization procedings to a referee in bankruptcy:

> SEC. 117. The judge may, at any stage of a proceeding under this chapter, refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of this chapter, or to a referee as special master to hear and report generally or upon specified matters. Only under special circumstances shall references be made to a special master who is not a referee. The appointment of a receiver in a proceeding under this chapter shall be by the judge.

Section 38 of the bankruptcy act, applicable in Chapter X proceedings because of the operation of § 114 (see n. 3), defiines the jurisdiction of referees as follows:

> § 38. *Jurisdiction of Referees.* Referees are hereby invested, subject always to a review by the judge, with jurisdiction to . . .
>
> • • •

> (6) perform such of the duties as are by this Act conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided;
> . . .

The Eastern District of Michigan, by local bankruptcy rule, has authorized the bankruptcy judges of the District to exercise the full breadth of jurisdiction permissible under the bankruptcy act. Local bankruptcy rule 3, a proposed rule at the time of the litigation herein, and effective as of November 3, 1975, reads as follows:

> **RULE 3**
>
> **Referees—General Jurisdiction**
>
> The Bankruptcy Judges of this District shall have concurrent jurisdiction in all divisions of this district; and they and each of them are hereby empowered and authorized to do all acts, conduct all proceedings, render all judgments and orders and perform all duties as prescribed by the Bankruptcy Act, the Rules of Bankruptcy Procedure these rules or the rules of the United States District Court applicable in a civil action.

It thus appears that if the accounts receivable action between Atlas and Rocco was part of the "proceeding" as that term is used in § 117, and if the action was not "reserved to the judge," it was within the power of the District Court sitting as a reorganization court to refer it to Bankruptcy Judge Bobier, and thereafter it was within the jurisdiction of the bankruptcy judge to adjudicate the matter. We find no express provision of Chapter X reserving the resolution of the action herein to the judge of the District Court. We also conclude that this action was a "proceeding" which could be referred to a bankruptcy judge.

There has long been a distinction in straight bankruptcy between the "summary" jurisdiction of the bankruptcy court and the bankruptcy referee over "proceedings in bankruptcy," and the "plenary" jurisdiction of the United States District Courts and State courts over "independent suits." *See Weidhorn* v. *Levy*, 253 U.S. 268 (1920). The summary-plenary distinction is used confusingly in bankruptcy decisions, sometimes to delineate jurisdiction in the sense of power to adjudicate conferred by statute, other times to define procedural rights, and, on occasion, to refer to both of these senses simultaneously. *See, e.g., Harris* v. *Brundage Co.*, 305 U.S. 160 (1938); *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932); *Taubel, Etc., Co.* v. *Fox*, 264 U.S. 426 (1924); *Weidhorn* v. *Levy, supra*, 253 U.S. 268; *Duda* v. *Sterling Mfg. Co.*, 178 F.2d 428 (8th Cir. 1949); *Warder* v. *Brady*, 115 F.2d 89 (4th Cir. 1940).

Where an action is characterized as a proceeding within the summary jurisdiction of the bankruptcy court, it is generally said that the action can be referred to the bankruptcy referee for adjudication. 2A COLLIER ¶ 38.09[2] (14th ed.). Where, however, an independent or plenary action must be maintained, reference of such an action to the bankruptcy judge raises substantial jurisdictional problems. This is apparently true in straight bankruptcy even where it is clear that there is jurisdiction in the bankruptcy court (the District Court sitting in bankruptcy) to hear and determine the matter. Collier explains:

> Although §§ 60b, 67c and 70e(3) specifically grant concurrent jurisdiction to any "bankruptcy court," it is well settled that the referee does not, without the parties' consent, have jurisdiction over a plenary suit instituted under §§ 60, 67 or 70, even though the district court has such jurisdiction. Various reasons for this rule have been stated. It has been said that the machinery of the referee's court is not adapted to the formal procedure necessary for a plenary action; and it has been asserted that

> although for many purposes the referee has the powers of a court of bankruptcy, it was not the intent of Congress to confer upon referees the special power given the district courts to hear such plenary suits. In *Weidhorn* v. *Levy*, the court stressed the importance of General Order 12(1), and pointed out that the word "proceedings" therein could not be taken to mean independent plenary actions. Whatever the basis, the rule is firmly entrenched, and regardless of the general position of the referee as a court of bankruptcy under the Act, the Rules or local rules conferring such power, the referee's jurisdiction is summary only. He cannot, therefore, hear and determine the issues in a suit by the receiver or trustee where the defendant is entitled to a plenary form of action and has not consented to the referee's exercise of summary jurisdiction.
>
> 2 COLLIER ¶ 23.15[7](14th ed.). (Footnotes omitted.)

The rule in straight bankruptcy that a bankruptcy court or bankruptcy referee cannot exercise summary jurisdiction over a controversy where the defendant is entitled to a plenary proceeding and there is timely objection to the exercise of summary jurisdiction has been discussed in this Circuit in the context of reorganization under Chapter X. *See In Re Mt. Forest Fur Farms of America*, 122 F.2d 232 (6th Cir. 1941), *cert. denied*, 314 U.S. 701 (1942), *rehearing denied*, 315 U.S. 826 (1942). *See also In Re International Leasing Corporation*, 391 F.2d 572 (6th Cir. 1968). *But see In Re Cuyahoga Finance Co.*, 136 F.2d 18 (6th Cir. 1943). It has been held in this Court that after a broad reference to a referee by a District Court sitting in reorganization under Chapter X, the referee exercises powers similar to those possessed by a referee in stright bankruptcy. *In Re D.I.A. Sales Corporation*, 339 F.2d 175 (6th Cir. 1964).

We conclude that under the facts of the present case, whether the Atlas-Rocco action be characterized as summary or plenary, it was a "proceeding" as that term is used in

§ 117, and as such it could be referred by the reorganization court to the bankruptcy judge. Compare *Weidhorn, supra*, 253 U.S. 273, with *Williams, supra*, 331 U.S. at 658, n. 42.

If we characterize the *Atlas-Rocco* matter as being within the summary jurisdiction of the reorganization court, which would be to say that this controversy regards property in the actual or constructive possession of the reorganization court (*See Willyerd* v. *Buildex Company*, 463 F.2d 996 (6th Cir. 1972)), then it was clearly within the ordinary summary powers of Bankruptcy Judge Bobier after the reference to him. If we were to determine that Rocco's claim was adverse, not merely colorable, and thus that Rocco was entitled to plenary proceedings, the burden was on Rocco at the time of the reference of the matter to Judge Bobier to object to the power or to the nature of the proceedings before the bankruptcy judge. 6 COLLIER ¶ 3.06 (14th ed.). Rocco did not object to jurisdiction before Bankruptcy Judge Bobier during the Chapter X proceedings. In fact, on November 13, 1974, Rocco filed an answer to Atlas' complaint and asserted an affirmative counterclaim of its own against Atlas. Rocco will not now be heard to complain that the bankruptcy judge was without jurisdiction to entertain the controversy pursuant to the reference from the District Court sitting as a reorganization court.

Rocco's argument that it was compelled to answer the Atlas complaint so as to avoid default is without merit. Rocco had the alternative of filing a challenge to jurisdiction before the bankruptcy judge rather than filing its answer and counterclaim. Rocco's further contention that it had no knowledge of the Chapter X proceeding and thus was not on notice that there were orders of reference and the like is also difficult to understand in light of the recitals in the complaint filed against it by Atlas in September 1974, which stated:

> 1. Plaintiff, HAROLD MORRISON, is the Trustee under Chapter X of the Bankruptcy Act in the estate of

> Atlas Concrete Pipe, Inc., a corporation incorporated under the laws of the State of Michigan and/or Atlas Concrete Conduit, Inc., a corporation incorporated under the laws of the State of Michigan, having their principal places of business in Flint, Michigan; said Trustee being a Trustee in Bankruptcy under the provisions of Article 10 in the United States District Court for the Eastern District of Michigan, Southern Division, in cause number 74-60655.

(C) Jurisdiction after Termination of Chapter X and Appointment of Receiver in Bankruptcy

Given the conclusion that Bankruptcy Judge Bobier acquired jurisdiction over the Atlas-Rocco controversy pursuant to the reference from the reorganization court and the failure of Rocco to timely object, did the bankruptcy court lose jurisdiction o er the controversy when Atlas moved out of Chapter X into straight bankruptcy and a receiver replaced the Chapter X trustee?

Rocco contends that when Atlas passed into straight bankruptcy, the jurisdictional provisions of § 23[6] of the bankruptcy act became immediately effective to oust the bankruptcy court of jurisdiction. Section 102 of the act, quoted in part in note 5 above, appears to deal with the situation herein. Section 102 reads in full:

> SEC. 102. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That *section* 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, *shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive.* For the

[6] See n. 1, *supra.*

> purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered. (Emphasis added.)

Also pertinent is § 238 of the bankruptcy act which provides in part:

> SEC. 238.
>
> (a) Upon the entry of an order directing that bankruptcy be proceeded with—
>
> (1) where the petition was filed under section 127 of this Act, the bankruptcy proceeding shall be deemed reinstated and shall thereafter be conducted, so far as possible, as if the petition under this chapter had not been filed; or where the petition was filed under section 128 of this Act, *the proceeding shall thereafter be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed*, and a decree of adjudication had been entered at the time when the petition under this chapter was approved; . . . (Emphasis added.)

This court and other courts have had occassion to acknowledge that the statutory scheme for transition from Chapter X to straight bankruptcy provides for a continuous and unitary proceeding. *See In Re Manufacturers Trading Corp.*, 194 F.2d 961 (6th Cir. 1952); *In Re Wil-low Cafeterias*, 111 F.2d 83 (2d Cir. 1940); 6A COLLIER ¶ 12.05[3] (14th ed.). As this court noted in *Hercules Service Parts Corp.* v. *United*

of David Cuvrell as receiver in bankruptcy, and we find this argument to be without merit for the reasons stated by Judge Harvey in his reported opinion.

Accordingly, the findings of the District Court that the bankruptcy court has jurisdiction over the controversy herein is affirmed and the case is remanded for further proceedings.

The costs of this appeal are taxed against appellant.

OFFICE OF THE CLERK

JOHN P. HEHMAN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

May 6, 1977

Mr. William R. Brashear
Mr. Robert L. Segar

Re: In The Matter Of: Atlas Concrete Pipe, Inc., et al.
Harold Morrison, Trustee v. Rocco Ferrera & Co., Inc.
Our No. 76-1165
Dist. Ct. No. 74-60655

Gentleman:

The Court today announced its decision in the above-entitled case.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Costs may be recovered by the Appellee as provided by Rule 39, Federal Rules of Appellate Procedure.

Very truly yours,

John P. Hehman, Clerk

By Betty Tibbles
Betty Tibbles
Deputy Clerk

Enclosures

No. 76-1165

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

SEP 16 1977

JOHN P. HEHMAN, Clerk

In the Matter of HAROLD MORRISON, Trustee of Atlas Concrete Pipe Inc., and/or Atlas Concrete Conduit, Inc., Plaintiff and Counter-Defendant, Appellee, v. ROCCO FERRERA & CO., INC., a Michigan corporation, Defendant and Counter-Plaintiff, Appellant.	ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and SILER, District Judge.*

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

John P. Hehman
CLERK

*Honorable Eugene E. Siler, Jr., Judge, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

In the Matter of Harold MORRISON, Trustee of Atlas Concrete Pipe, Inc., and/or Atlas Concrete Conduit, Inc., Plaintiff and Counter Defendant Appellee,

v.

ROCCO FERRERA & CO., INC., a Michigan Corporation, Defendant and Counter Plaintiff Appellant.

No. 16-60003.

United States District Court, E. D. Michigan, S. D.

Nov. 17, 1975.

Appeal was taken from order of the bankruptcy judge denying counterplaintiff's motion to dismiss for lack of jurisdiction. The District Court, James Harvey, J., held that dismissal of Chapter X reorganization proceedings and discharge of trustee did not entitle defendant to dismissal of action; that, accepting allegations of plaintiff, defendant owed bankrupt money, and, accepting allegations of defendant, it had property belonging to bankrupt in its possession, defendant's general denial of liability did not oust bankruptcy court of jurisdiction; and that defendant's filing of counterclaim was clear consent to jurisdiction of bankruptcy court, even if the bankruptcy court did not have property within its constructive possession.

Finding of bankruptcy court that it had jurisdiction affirmed and case remanded for trial.

1. Bankruptcy ⇐=382.2

Proceedings following termination of Chapter X reorganization proceedings are continuous therewith, so that person who was appointed receiver or trustee in bankruptcy assumes position of real party in interest formerly held by Chapter X trustee. Bankr.Act, §§ 228(2), 233, 11 U.S.C.A. §§ 628(2), 633.

2. Bankruptcy ⇐=602

Under Bankruptcy Act section providing that proceedings after reorganiza-

tion are to be conducted in same manner and with like effect as if a voluntary petition for adjudication had been filed at time when petition under Chapter X was filed and decree of adjudication had been entered at time when petition was approved, the intention is to "roll the clock back" so that matters commenced under reorganization proceeding are treated as if begun under ordinary bankruptcy proceedings and ordinary bankruptcy proceeding is treated as if begun when reorganization proceedings began. Bankr.Act, §§ 236(2), 238, 11 U.S.C.A. §§ 636(2), 638.

3. Bankruptcy ⇐662.2

Proceedings following entry of order that bankruptcy be proceeded with are continuation of Chapter X reorganization proceedings and as such there is no reason why receiver or trustee in bankruptcy should not step into shoes of Chapter X trustee as real party in interest. Bankr.Act, §§ 236(2), 238, 11 U.S.C.A. §§ 636(2), 638.

4. Bankruptcy ⇐682

That Chapter X reorganization proceedings were dismissed and trustee discharged did not entitle defendant debtor, which had been sued by trustee, to dismissal on basis that the Chapter X proceedings had been terminated where, six days after objection for substitution, receiver was appointed. Bankruptcy Rules, rule 717, 28 U.S.C.A.; Fed.Rules Civ.Proc. rule 17, 28 U.S.C.A.

5. Bankruptcy ⇐232(1)

Under section of Bankruptcy Act creating jurisdiction of bankruptcy courts and conferring original jurisdiction in both law and equity to cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, if chose in action is within estate of bankrupt, the section does not limit bankruptcy court to determining controversies but also empowers court to collect the debt. Bankr.Act, §§ 2, sub. a(7), 23, 11 U.S.C.A. §§ 11(a)(7), 46.

6. Bankruptcy ⇐238(5)

Section of Bankruptcy Act which makes the Act inapplicable to certain suits by trustee or receiver against adverse claimants does not limit jurisdiction of bankruptcy where court has property in question in its possession. Bankr. Act, §§ 2, sub. a(7), 23, 11 U.S.C.A. §§ 11(a)(7), 46.

7. Bankruptcy ⇐238(1)

Distinction between property claims which may be enforced summarily and those which require resort to adversarial procedure is not viable basis on which to determine whether bankruptcy court may exercise its jurisdiction. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A.

8. Bankruptcy ⇐238(5)

In deciding whether bankruptcy court has jurisdiction, court need not look into whether an adversary procedure is proper, but rather the test for jurisdiction is whether court has possession, either actual or constructive, of property in question. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A.

9. Bankruptcy ⇐238(5)

Bankruptcy court has constructive possession of chose in action if bankrupt remained the legal owner thereto up to time of filing the petition and if there is not a bona fide dispute as to actual existence of chose in action. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A.; Bankr.Act, §§ 236(2), 238, 11 U.S.C.A. §§ 636(2), 638.

10. Bankruptcy ⇐676.1(2)

Where Chapter X trustee, in filing suit, alleged that bankrupt had sold to defendant merchandise for sum which remained unpaid and defendant admitted existence of contract and delivery of goods but alleged that plaintiff had not furnished goods agreed upon, so that, accepting allegations of plaintiff, defendant owed it money, and, accepting allegations of defendant, it had property belonging to plaintiff in its possession, defendant's general denial of liability did not oust bankruptcy court of jurisdiction. Bankruptcy Rules, rules 102, 701, 28 U.S.

C.A.; Bankr.Act, §§ 238(2), 238, 11 U.S.C.A. §§ 638(2), 638.

11. Bankruptcy ⇐676.1(2)

Where during Chapter X reorganization proceedings, but after proceedings had been referred to referee to collect receivables, the Chapter X trustee filed claim for sum due for merchandise sold, buyer's filing of counterclaim was clear consent to jurisdiction of bankruptcy court, even if the bankruptcy court did not have property within its constructive possession. Bankr.Act, § 101 et seq., 11 U.S.C.A. § 501 et seq.

12. Bankruptcy ⇐676.1(2)

Bankruptcy judge sitting by reference during Chapter X reorganization proceedings has no power to hear issues involved in regard to property in possession of one who is asserting an adverse claim. Bankr.Act, § 101 et seq., 11 U.S.C.A. § 501 et seq.

13. Bankruptcy ⇐662

Consent of corporation, which allegedly owed sum to debtor, to jurisdiction of referee in Chapter X reorganization proceedings was equally a consent to jurisdiction of court in later bankruptcy proceedings. Bankr.Act, § 101 et seq., 11 U.S.C.A. § 501 et seq.

14. Bankruptcy ⇐662

Consent to jurisdiction of judge in bankruptcy, once given, cannot be withdrawn. Bankr.Act, § 101 et seq., 11 U.S.C.A. § 501 et seq.

Stewart A. Newblatt, Flint, Mich., for plaintiff and counter defendant appellee.

Robert L. Segar, Flint, Mich., for trustee.

William R. Brashear, Livonia, Mich., for defendant and counter plaintiff appellant.

MEMORANDUM OPINION AND ORDER

JAMES HARVEY, District Judge.

This is an appeal from an order by Bankruptcy Judge Harold H. Bobier denying the defendant and counter-plaintiff's motion to dismiss for lack of jurisdiction.

On March 15, 1974, Atlas Concrete Pipe, Inc., plaintiff-appellee herein, filed a petition under Chapter X for reorganization. This petition was approved and a trustee was appointed. After an order had been entered that all proceedings to collect receivables be heard before Harold H. Bobier, Bankruptcy Judge, sitting by reference, the trustee commenced an action against Rocco Ferrara & Co., Inc. for alleged indebtedness. Defendant-appellant filed an answer with a demand for jury trial and a counterclaim for breach of contract.

At this point, the Chapter X proceedings were terminated, plaintiff-appellee was adjudicated a bankrupt, and the proceedings were referred to Bankruptcy Judge Bobier for liquidation. Twelve days thereafter, on March 11, 1975, defendant-appellant filed a motion to dismiss the suit brought by the Chapter X trustee on the grounds that the Chapter X proceedings had been terminated and on the grounds that the Bankruptcy Court did not have jurisdiction over a case involving the collection of a receivable owed to the bankrupt, absent the consent of the account debtor.

At a hearing on May 6, 1975, the bankruptcy judge ruled that he had jurisdiction to proceed under the general referral and that, in any event, defendant-appellant's allegations of adverse claim were generally stated and led to the conclusion that the adversity was merely colorable. Following the denial of the motion to dismiss, a receiver was appointed in the bankruptcy proceedings and the Chapter X trustee resigned.

On appeal, the parties raise the following issues:

(1) Should a motion to dismiss be granted where the moving party is a defendant-debtor in a suit brought in the United States Court by a trustee under Chapter X proceedings when the Chapter X proceeding has been dismissed, its trustee discharged, and no substitution

has been made by the receiver subsequently appointed in an ordinary bankruptcy proceeding?

(2) Does the bankruptcy court in an ordinary bankruptcy proceeding have jurisdiction over an account receivable of a bankrupt corporation so as to render a personal judgment against the account debtor, absent the consent of the account debtor to this jurisdiction?

(2A) Can the filing of an answer by defendant-debtor in a suit by a trustee under Chapter X proceedings, where the United States District Court clearly had jurisdiction, be construed as a consent to confer jurisdiction in the bankruptcy court in a subsequent bankruptcy proceeding?

I.

[1] There is no merit in appellant's contention that the motion to dismiss should have been granted because the Chapter X proceedings were terminated and the Chapter X trustee was no longer the real party in interest. The proceedings following the termination of Chapter X proceedings are continuous therewith, so that the person who is appointed the receiver or trustee in bankruptcy assumes the position of real party in interest formerly held by the Chapter X trustee.

[2] The language of Section 238 of the Bankruptcy Act, 11 U.S.C. § 638, provides that proceedings after reorganization are to be conducted:

> . . . in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved."

The clear intent of this section is to "roll the clock back" so that matters commenced under the reorganization proceeding are treated as if begun under ordinary bankruptcy proceedings and the ordinary bankruptcy proceeding is treated as if begun when the reorganization proceedings began. *In re Manufacturers Trading Corp.*, 194 F.2d 961 (C.A.6, 1952; *In the Matter of Atlas Sewing Centers Inc.*, 437 F.2d 607, 614 (C.A.5, 1971).

Colliers on Bankruptcy, Fourteenth Edition, Volume 6A, Section 12.05(3), dealing with results following the entry of an order that bankruptcy be proceeded with, states the rule:

> "(U)pon failure of the reorganization and the entry of an order under Section 238(2), the proceeding in effect becomes one of involuntary bankruptcy. The order directing bankruptcy liquidation, however, does not initiate a *new* bankruptcy proceeding at that point; the order instead is merely one in a continuous proceeding begun when the original petition for bankruptcy is filed." (emphasis in original, footnotes omitted)

[3] It is clear, thus, that the proceedings following the entry of an order that bankruptcy be proceeded with are a continuation of the Chapter X proceedings. As such, there is no reason why the receiver or trustee in bankruptcy should not step into the shoes of the Chapter X trustee as the real party in interest. Section 238 states:

> "(A) trustee shall be elected or appointed pursuant to section 72 of this title and shall supersede any trustee previously appointed."

This last-quoted language clearly implies that the trustee in bankruptcy, when appointed, shall take over from the Chapter X trustee. Due to the continuous nature of the proceedings, there is no reason why the receiver in bankruptcy would not stand in the same position.

[4] Accordingly, upon the appointment of a receiver, the receiver became the real party in interest to the action commenced by the Chapter X trustee. It is irrelevant that the receiver had not been appointed when appellant filed his motion to dismiss. Bankruptcy Rule 717, making Rule 17 of the Federal Rules of Civil Procedure applicable to bankruptcy proceedings, allows a reasonable time after objection for substitution. The de-

lay of six days between objection and appointment of the receiver was not unreasonable.

II.

Appellant also maintains that his motion to dismiss should have been granted because a bankruptcy court may not exercise its jurisdiction to enforce a debt against a debtor of the bankrupt without the debtor's consent. There is support in authority for appellant's position, but for the reasons stated herein, the Court is of the opinion that the controlling rule is that the bankruptcy court may determine and enforce the rights of various claimants to any property which is within its possession.

Although it is well established that a court of bankruptcy may determine the rights of claimants to property within its possession, this rule has been held inapplicable where the property consists of a chose in action and the trustee is undertaking to enforce the bankrupt's claim against the debtor. In general, see Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.05. There is no valid reason for imposing this distinction.

Colliers, *supra*, at 23.05(4) states that a bankruptcy court may determine the rights of various claimants to an intangible which is within its constructive possession:

> "Where the intangible consists of a chose in action, such as a debt or a contract claim, such intangible may be said to be in the constructive possession of the bankruptcy court so as to enable the court summarily to determine the rights of various claimants to the chose in action, if the bankrupt remained the legal owner up to the time of filing of the petition." (footnote omitted)

If the bankruptcy court may determine the rights of claimants to a chose in action, it may also enforce those rights against the debtor of the bankrupt. Section 2(a)(7) of the Bankruptcy Act, 11 U.S.C.A. § 11(a)(7) (1970) creating the jurisdiction of the bankruptcy courts, confers original jurisdiction in both law and equity to:

> "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise herein provided."

[5] If a chose in action is within the estate of the bankrupt, Section 2(a)(7) does not limit the bankruptcy court to determining controversies but also empowers the court to collect the debt.

[6] The only limitation imposed on Section 2(a)(7) is that stated in Section 23 of the Bankruptcy Act, which makes the act inapplicable to certain suits by the trustee or receiver against adverse claimants. It is well settled that this section does not limit the jurisdiction of the Bankruptcy Court where the court has the property in question in its possession. Thus, in *Murphy v. John Hoffman Co.*, 211 U.S. 562, 568–569, 29 S.Ct. 154, 156, 53 L.Ed. 327, 330 (1909), in discussing the jurisdiction of bankruptcy courts under the statute, the Supreme Court stated:

> "[J]urisdiction . . . is limited to courts where the bankrupt himself could have prosecuted the action . . . but, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property."

Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.04(2) states the same rule:

> "The power of a bankruptcy court to act summarily regarding controversies over property in its actual or construc-

tive possession, and proceedings arising in the course of administration, is not in any way restricted by the terms of § 23." (footnotes omitted)

The question, thus, is why a court in bankruptcy may not enforce a chose in action against the obligor thereon where such is within the court's constructive possession. The answer traditionally given is that the procedure in bankruptcy is primarily summary, as opposed to an adversary procedure, and that it requires a plenary action with adversarial procedures to enforce a chose in action.[1] This view was echoed by this court in the case of *In the Matter of Hammond Standish & Co.*, 128 F.Supp. 353, 355 (E.D.Mich.1954), where the court held that the bankruptcy court could not exercise its jurisdiction to enforce a chose in action against the debtor without the debtor's consent. Quoting from *In Re Standard Gas & Electric Co.*, 119 F.2d 658, 661–662 (C.A.3, 1941), this court stated:

> "In a broad sense a claim by a third person is property of the debtor. As such the reorganization court may direct the prosecution by the trustee of the debtor if it is appropriate to do so in order to effect the debtor's reorganization. But it is a species of property which may only be realized upon for the benefit of the debtor and its creditors by the successful prosecution of a plenary suit against the third persons involved."

[7] This distinction between property claims which may be enforced summarily and those which require resort to an adversarial procedure is no longer a viable basis on which to determine whether the bankruptcy court may exercise its jurisdiction.

The new Bankruptcy Rules, in Part VII, make complete provisions for adversary proceedings. Rule 701, in particular, states that these rules govern any proceeding instituted by a party before a bankruptcy judge to recover money or property. Rule 102 states that all proceedings in the case, implicitly including adversary proceedings, are to be before the referee except as specifically provided. Given the clear intent of the new rules that adversary proceedings be conducted before the referee, and these rules having made ample provision for adversary proceedings, there no longer remains any reason to deny the bankruptcy court this aspect of the jurisdiction conferred upon it.

This district's proposed local rules fully support this approach. Proposed Rule 3, Local Rules in Bankruptcy of the United States District Court for the Eastern District of Michigan, authorizes the Bankruptcy Judges of this District Court to exercise all of the authority with which they have been empowered:

> "3. JURISDICTION.
>
> The Bankruptcy Judges of this District Court shall have concurrent jurisdiction in all divisions of this district, and they and each of them are hereby empowered and authorized to do all acts, conduct all proceedings, render all judgments and orders and perform all duties as prescribed by the Bankruptcy Act, the Rules of Bankruptcy Procedure, these rules or the rules of the United States District Court applicable in a civil action."

[8, 9] Thus, in deciding whether the bankruptcy court has jurisdiction, the court need not look into whether an adversary procedure is proper. Rather, the test for jurisdiction in the bankruptcy court is whether it has possession, either actual or constructive, of the property in question. *McCullough v. Mathmore*, 271 F.2d 161 (C.A.6, 1959); *In the Matter of Lehigh Valley R.R.*, 458 F.2d 1041 (C.A.3, 1972). The bankruptcy court has constructive possession of a chose in action if the bankrupt remained the legal owner thereto up to the time of filing the petition and if there is not a bona-fide

1. The summary-plenary distinction relates to procedural rights and does not per se define jurisdiction. *Matter of Tax Assn. of Illinois*, 303 U.S. 160, 58 S.Ct. 134, 82 L.Ed. 709 (1933), reh. den. 305 U.S. 674, 59 S.Ct. 247, 83 L.Ed. 437.

dispute as to the actual existence of the chose in action. *Willyerd v. Builders Co.*, 463 F.2d 996 (C.A.6, 1972); Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.05, footnote 30 and cases cited therein.

Applying these considerations to the instant case, the bankruptcy judge conducted a hearing at which time he determined that appellant's claim of adversity was colorable only. Appellant does not challenge this finding, but asserts instead that a chose in action cannot be enforced in a court of bankruptcy because resort to a plenary procedure is required. If appellant's claim of adversity was colorable only, though, the bankruptcy court would have jurisdiction, as there would not be a bona-fide dispute as to the existence of the chose in action.

[10] The court's review of the record satisfies it that the bankruptcy court does have jurisdiction. The Chapter X trustee, in filing suit against Rocco Ferraro & Co., alleged that plaintiff delivered and sold to the defendant merchandise in a sum exceeding $110,000, which amount remains unpaid. Defendant, in its answer, admitted the existence of the contract and the delivery of the goods, but alleged that plaintiff did not furnish the goods agreed upon. Accepting the allegations of the plaintiff, defendant owes it money. Accepting the allegations of the defendant, it has property belonging to plaintiff in its possession. Defendant's general denial of liability does not oust the bankruptcy court of jurisdiction. *In the Matter of Four Seasons Nursing Centers of America Inc.*, 472 F.2d 744 (C.A.10, 1972); *Spach v. Johnina*, 291 F.2d 619 (C.A.5, 1961), cert. den. 368 U.S. 985, 82 S.Ct. 599, 7 L.Ed.2d 523.

II A.

[11] Even if it did not have the property in question within its constructive possession, the bankruptcy court would have jurisdiction to enforce the obligation of appellant to the bankrupt. During the Chapter X proceedings, but after the proceedings had been referred to the referee to collect receivables, appellee filed the claim in question and appellant responded by filing an answer and a counterclaim. Appellant's filing of a counterclaim was a clear consent to the jurisdiction of the bankruptcy court.

Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.05(1) states the well-recognized rule that the bankruptcy court acquires jurisdiction over a claim involving property which is not in its possession by the consent of the adverse claimant:

> "It is well settled that in all cases where a party is entitled to the determination of his rights in a plenary action, he may nevertheless consent to the exercise of summary jurisdiction by the bankruptcy court and in that manner have his rights adjudicated."

[12-14] The filing of a counterclaim is an unequivocal consent to the bankruptcy court's jurisdiction when done without objection. *Tamalpa Town and Country Club v. Manchester Construction Finance Corp.*, 252 F.Supp. 30 (S.D.Cal., 1966); *James Talbot Inc. v. Glavin*, 104 F.2d 831 (C.A.3, 1939), cert. den. 308 U.S. 598, 60 S.Ct. 130, 84 L.Ed. 501. It is irrelevant that the bankruptcy judge was sitting by reference during Chapter X proceedings. The referee, the same as a judge of bankruptcy in ordinary bankruptcy proceedings, has no power to hear the issues involved in regards to property in the possession of one who is asserting an adverse claim. *Weithorn v. Levy*, 253 U.S. 268, 40 S.Ct. 534, 64 L.Ed. 898 (1920). In general, see Colliers on Bankruptcy, Fourteenth Edition, Volume 6, Section 3.13. Since the jurisdiction of a referee and of a judge in bankruptcy in ordinary bankruptcy proceedings are the same in this respect, appellant's consent to the referee's jurisdiction is equally a consent to the jurisdiction of the court in the later bankruptcy proceedings. As was fully discussed in part I of this Opinion, the bankruptcy proceedings are continuous with the Chapter X proceed-

ings and are to be conducted as far as possible as if the bankruptcy proceedings were commenced when the Chapter X proceedings were commenced. Moreover, a consent to jurisdiction, once given, cannot be withdrawn. *Operators' Piano Co. v. First Wisconsin Trust Co.*, 283 Fed. 904 (C.A.7, 1922).

For all of these reasons, the finding of the Bankruptcy Court that it has jurisdiction over the claim in question is affirmed and the case is remanded for trial.

IT IS SO ORDERED.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

The following sections of the Bankruptcy Act (Title 11 of the United States Code) are relevant to this case:

> § 2. [11 USC § 11] Creation of courts of bankruptcy and their jurisdiction.
>
> "(a) The courts of the United States hereinbefore defined as courts of bankruptcy are created courts of bankruptcy and are invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to . . .
>
> (7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property in any estate whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such

interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

§ 23. [11 USC § 46] Jurisdiction of controversies between receivers and trustees and adverse claiments.

"(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107, and 110 of this title.

§ 38. /- 11 USC § 66 -/ Jurisdiction of referees.

Referees are invested, subject always to a review by the judge, with jurisdiction to . . . (6) perform such of the duties as are by this title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided;

§ 101 /- 11 USC §§ 501 -/ Exclusive application of chapter.

The provisions of this chapter shall apply exclusively to proceedings under this chapter.

§ 102. /- 11 USC § 502 -/ Application of other provisions.

The provisions of chapters 1-7 of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: Provided, however, That section 46, subdivisions (h) and (n) of section 93, section 104, and subdivision (f) of section 110 of this title, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters 1-7 of this title. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors",

and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 528 of this title, and the date of adjudication shall be taken to be the date of approval of a petition filed under sections 527 or 528 of this title except where an adjudication has previously been entered.

§ 114. [11 USC § 514] Matters upon approval of petition; jurisdiction, powers, and duties.

Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

§ 115. [11 USC § 515] Same; jurisdiction as in insolvency.

Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

§ 117. [11 USC § 517] Reference to referee or special master; appointment of receiver.

The judge may, at any stage of a proceeding under this chapter refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of this chapter, or to a referee as special master, to hear and report generally or upon specified matters. Only under special circumstances shall references be made to a special master who is not a referee. The appointment of a receiver in a proceeding under this chapter shall be by the judge.

§ 236. [11 USC § 636] Failure to effectuate plan or consummation.

If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall . . .

(2) where the petition was filed under section 528 of this title, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title, or dismissing the proceeding under this chapter, as in the

opinion of the judge may be in the interests of creditors and stockholders.

§ 238. /~ 11 USC § 638 ~/ Procedure upon order directing that bankruptcy be proceeded with.

(a) Reinstatement of bankruptcy proceeding; trustees; filing of separate debt schedule; tax claims; provable claims; date for first meeting of creditors; disallowance of untimely claims.

Upon the entry of an order directing that bankruptcy be proceeded with - -

(1) where the petition was filed under section 127 of this Act, the bankruptcy proceeding shall be deemed reinstated and shall thereafter be conducted, so far as possible, as if the petition under this chapter had not been filed; or where the petition was filed under section 128 of this Act, the proceeding shall thereafter be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved;

APPENDIX C

SELECTED PLEADINGS

I. Order Re: Determination of Accounts Receivable

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:	No. 74-60655
ATLAS CONCRETE PIPE, INC. and ATLAS CONCRETE CONDUIT, INC., Michigan corporations,	In Proceedings for the Reorganization of a Corporation
Debtor. /	ORDER RE: DETERMINATION OF ACCOUNTS RECEIVABLE

At a session of said Court held in the Federal Building, Detroit, Michigan on the 28th day of June, A. D., 1974

Trustee herein having issued show cause to the existing accounts receivable of the debtors, Atlas Concrete Pipe, Inc. and/or Atlas Concrete

Conduit, Inc. and hearing having been heard before this Court; and it appearing to this Court that many matters are seriously contested and that it will be necessary that these matters in dispute be referred to a tribunal of competent jurisdiction, NOW, THEREFORE,

IT IS HEREBY ORDERED that the Trustee be directed to issue the necessary pleadings required to initiate proceedings against the accounts receivable which are in dispute and that said matters in dispute be referred to the Honorable Harold H. Bobier, Judge in Bankruptcy, Federal Building, Flint, Michigan.

IT IS FURTHER ORDERED that the Honorable Harold H. Bobier shall take what action is necessary to resolve said accounts receivable either through settlement and/or whatever litigation is necessary.

IT IS FURTHER ORDERED that the said Honorable Harold H. Bobier be authorized and directed to take what action and to issue what orders are necessary to accomplish the settlement of the said accounts receivable as may be directed to him from time to time by Harold Morrison, Trustee of Atlas Concrete Pipe, Inc. and/or Atlas Concrete Conduit, Inc.

/s/ Thomas P. Thornton
Hon. Thomas P. Thornton
in the absence of Hon.
Stephen J. Roth

II. Complaint at Law

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MORRISON, TRUSTEE OF ATLAS CONCRETE PIPE, INC. AND/OR ATLAS CONCRETE CONDUIT, INC.	Civil Action File No. 74-60655
Plaintiff,	Complaint
vs.	At Law
ROCCO FERRERA & CO., INC.	
Defendant.	

1. Plaintiff, HAROLD MORRISON, is the Trustee under Chapter X of the Bankruptcy Act in the estate of Atlas Concrete Pipe, Inc., a corporation incorporated under the laws of the State of Michigan and/or Atlas Concrete Conduit, Inc., a corporation incorporated under the laws of the State of Michigan, having their principal places of business in Flint, Michigan; said Trustee being a Trustee in Bankruptcy under the provisions of Article 10 in the United States District Court for the Eastern District of Michigan, Southern Division, in cause number 74-60655.

2. Defendant is a resident and citizen of the State of Michigan having its principal place of business in the City of Livonia.

3. This suit is a suit of a civil nature wherein jurisdiction has been vested in the Federal District Court in the cause above cited and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

4. That on, about and prior to January 23, 1974 the said Plaintiff herein did manufacture, sell and deliver to the Defendant, inventory and/or merchandise in the sum of $110,608.87 and that said obligation remains unpaid and a debt due the Plaintiff herein.

WHEREFORE, Plaintiff demands Judgment against Defendant in the sum of One Hundred Ten Thousand Six Hundred Eight and 87/100 ($110,608.87) together with interest and costs wrongfully incurred and such other and further relief as this Court deems satisfactory.

Dated: Sept. 9, 1974

/s/ Frank E. Kenney, Jr.
Attorney for
Plaintiff, Harold
Morrison, Trustee
of Atlas Concrete
Pipe, Inc. and/or
Atlas Concrete
Conduit, Inc.

III. Order

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN BANKRUPTCY

IN THE MATTER OF

ATLAS CONCRETE PIPE, INC., a Michigan Corporation
ATLAS CONCRETE CONDUIT, INC.

Debtor.

No. 74-60655

ORDER

At a session of the said Court held the 12th day of November, 1974, the Honorable Cornelia G. Kennedy presiding.

IT APPEARING from the files and records of this court that the above entitled Chapter X proceeding was filed in this court March 15, 1974;

THAT numerous creditors have appeared therein by various counsel and various actions are pending before this court relating to the above debtor;

THAT SUCH actions and proceedings, for the benefit of the debtor and creditors alike, should receive more immediate attention than this court is presently able to grant, and that said proceedings can be handled more expeditiously in the Bankruptcy Division of this court.

NOW, THEREFORE, by virtue of the authority vested in this court, it is ordered that all proceedings and actions presently pending before this court and all proceedings and actions hereinafter taken in the above entitled cause shall be heard before the Honable Harold H. Bobier, Bankruptcy Judge with full power and authority, except those duties reserved by statute exclusively to the District Judge, and as to those matters the said Bankruptcy Judge shall hold the necessary hearings and make recommendations to this court.

Dated: 11/12/74 /s/ Cornelia G. Kennedy
Honorable Cornelia G. Kennedy
U.S. District Judge

IN THE SUPREME COURT
OF
THE UNITED STATES

October Term, 1977

No. 77-469

ROCCO FERRERA & CO.
a Michigan corporation,
Petitioner,

vs.

HAROLD MORRISON,
TRUSTEE OF ATLAS
CONCRETE PIPE, INC.,
and/or ATLAS CONCRETE
CONDUIT, INC.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

BRASHEAR, CONLEY AND TANGORA
(William R. Brashear)
Attorneys for Petitioner
32900 Five Mile Rd.
Livonia, MI 48154

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SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF
CERTIORARI TO
UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Now comes Rocco Ferrera & Co., a Michigan corporation, by and through its attorneys, Brashear, Conley and Tangora, and presents to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States this Supplemental Appendix to Petition for Writ of Certiorari.

In the Matter of Harold MORRISON,
Trustee of Atlas Concrete Pipe, Inc.
and/or Atlas Concrete Conduit, Inc.,
Plaintiff and Counter Defendant
Appellee,

v.

ROCCO FERRERA & CO., INC., a
Michigan Corporation, Defendant
and Counter Plaintiff Appellant.

No. 74-60655

United States District Court
E. D. Michigan, S. D.

Nov. 17, 1975

Appeal was taken from order of the bankruptcy judge denying counter plaintiff's motion to dismiss for lack of jurisdiction. The District Court, James Harvey, J., held that dismissal of Chapter X reorganization proceedings and discharge of trustee did not entitle defendant to dismissal of action, that accepting allegations of plaintiff, defendant owed bankrupt money, and

accepting allegations of defendant, it had property belonging to bankrupt in its possession, defendant's general denial of liability did not oust bankruptcy court of jurisdiction; and that defendant's filing of counterclaim was clear consent to jurisdiction of bankruptcy court, even if the bankruptcy court did not have property within its constructive possession.

Finding of bankruptcy court that it had jurisdiction affirmed and case remanded for trial.

1. Bankruptcy § 662.2

Proceedings following terminations of Chapter X reorganization proceeding are continuous therewith, so that person who was appointed receiver or trustee in bankruptcy assumes position of real party in interest formerly held by Chapter

X trustee. Bankr Act, §§ 236 (2), 238, 11 U.S.C.A. §§ 636(2), 638.

2. Bankruptcy § 662

Under Bankruptcy Act section providing that proceedings after reorganization are to be conducted in same manner and with like effect as if a voluntary petition for adjudication had been filed at time when petition under Chapter X was filed and decree of adjudication had been entered at time when petition was approved, the intention is to "roll the clock back" so that matters commenced under reorganization proceeding are treated as if begun under ordinary bankruptcy proceedings and ordinary bankruptcy proceeding is treated as if begun when reorganization proceedings began. Bankr. Act §§ 236(2), 238, 11 U.S.C.A. §§ 636(2), 638.

3. Bankruptcy §§ 662.2

Proceedings following entry of order that bankruptcy be proceeded with are continuation of Chapter X reorganization proceedings and as such there is no reason why receiver or trustee in bankruptcy should not step into shoes of Chapter X trustee as real party in interest. Bankr. Act §§ 236(2), 238, 11 U.S.C.A. §§ 636(2), 638.

4. Bankruptcy §§ 662

That Chatper X reorganization proceedings were dismissed and trustee discharged did not entitle defendant debtor, which had been sued by trustee, to dismissal on basis that the Chapter X proceedings had been terminated where, six days after objection for substitution, receiver was appointed. Bankruptcy Rules, rule 717, 28 U.S.C.A.; Fed Rules Civ.

Proc. rule 17, 28 U.S.C.A.

5. Bankruptcy § 293 (1)

Under section of Bankruptcy Act creating jurisdiction of bankruptcy courts and conferring original jurisdiction in both law and equity to cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, if chose in action is within estate of bankrupt, the section does not limit bankruptcy court to determining controversies but also empowers court to collect the debt. Bankr. Act, §§ 2, sub. (a)(7), 23, 11 U.S.C.A. §§ 11 (a)(7), 46.

6. Bankruptcy § 288(5)

Section of Bankruptcy Act which makes the Act inapplicable to certain suits by trustee or receiver against adverse claimants does not limit jurisdiction of bankruptcy

where court has property in question in its possession. Bankr. Act, § 2, sub. a (7), 23, 11 U.S.C.A. §§ 11 (a), (7), 46.

7. Bankruptcy ⚖ 288 (1)

Distinction between property claims which may be enforced summarily and those which require resort to adversarial procedure is not viable basis on which to determine whether bankruptcy court may exercise its jurisdiction. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A.

8. Bankruptcy ⚖ 288 (5)

In deciding whether bankruptcy court has jurisdiction, court need not look into whether an adversary procedure is proper, but rather the test for jurisdiction is whether court has possession, either actual or constructive, of property in question. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A.

9. Bankruptcy § 288 (5)

Bankruptcy court has constructive possession of chose in action if bankrupt remained the legal owner thereto up to time of filing the petition and if there is not a bona fide dispute as to actual existence of chose in action. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A; Bankr. Act §§ 236 (2), 238, 11 U.S.C.A. §§ 636 (2), 638.

10. Bankruptcy § 676.1 (2)

Where Chapter X trustee, in filing suit, alleged that bankrupt had sold to defendant merchandise for sum which remained unpaid and defendant admitted existence of contract and delivery of goods but alleged that plaintiff had not furnished goods agreed upon, so that, accepting allegations of plaintiff, defendant owed it money, and accepting allegations of

defendant, it had property belonging to plaintiff in its possession, defendant's general denial of liability, did not oust bankruptcy court of jurisdiction. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A; Bankr. Act, §§ 236 (2), 238, 11 U.S.C.A.§§ 636 (2), 638.

11. Bankruptcy § 676.1 (2)

Where during Chapter X reorganization proceedings but after proceedings had been referred to referee to collect receivables, the Chapter X trustee filed claim for sum due for merchandise sold, buyer's filing of counterclaim was clear consent to jurisdiction of bankruptcy court, even if the bankruptcy court did not have property within its constructive possession. Bankr. Act, § 101 et seq. 11 U.S.C.A. § 501 et seq.

12. Bankruptcy § 676.1 (2)

Bankruptcy judge sitting by reference during Chapter X reorganization proceedings has no power to hear issues involved in regard to property in possession of one who is asserting an adverse claim. Bankr. Act, § 101 et seq. 11 U.S.C.A. § 501 et seq.

13. Bankruptcy § 662

Consent of corporation, which allegedly owed sum to debtor, to jurisdiction of referee in Chapter X reorganization proceedings was equally a consent to jurisdiction of court in later bankruptcy proceedings. Bankr. Act, § 101 et seq., 11 U.S.C.A., § 501, et seq.

14. Bankruptcy § 662

Consent to jurisdiction of judge in bankruptcy, once given, cannot be withdrawn.

Bankr. Act, § 101 et seq, 11 U.S. C.A. § 501 et seq.

Stewart A. Newblatt, Flint, Mich., for plaintiff and counter defendant appellee.

Robert L. Segar, Flint, Mich, for trustee.

William R. Brashear, Livonia, Mich., for defendant and counter plaintiff appellant

MEMORANDUM OPINION AND ORDER

JAMES HARVEY, District Judge.

This is an appeal from an order by Bankruptcy Judge Harold H. Bobier denying the defendant and counter-plaintiff's motion to dismiss for lack of jurisdiction.

On March 15, 1974, Atlas Concrete Pipe, Inc., plaintiff -appellee herein, filed a petition under Chapter X for reorganization. This petition was approved and a trustee was

appointed. After an order had been entered that all proceedings to collect receivables be heard before Harold H. Bobier, Bankruptcy Judge, sitting by reference, the trustee commenced an action against Rocco Ferrera & Co., Inc. for alleged indebtedness. Defendant-appellant filed an answer with a demand for jury trial and a counter-claim for breach of contract.

At this point, the Chatper X proceedings were terminated, plaintiff-appellee was adjudicated a bankrupt, and the proceedings were referred to Bankruptcy Judge Bobier for liquidation. Twelve days thereafter, on March 11, 1975, defendant-appellant filed a motion to dismiss the suit brought by the Chapter X trustee on the grounds that the Chapter X proceedings had been terminated and on the grounds that the Bank-

ruptcy Court did not have jurisdiction over a case involving the collection of a receivable owed to the bankrupt, absent the consent of the account debtor.

At a hearing on May 6, 1975, the bankruptcy judge ruled that he had jurisdiction to proceed under the general referral and that, in any event, defendant-appellant's allegations of adverse claim were generally stated and led to the conclusion that the adversity was merely colorable. Following the denial of the motion to dismiss, a receiver was appointed in the bankruptcy proceedings and the Chapter X trustee resigned.

On appeal, the parties raise the parties raise the following issues:

(1) Should a motion to dismiss be granted where the moving party is a

defendant-debtor in a suit brought in the United States Court by a trustee under Chapter X prcceedings when the Chapter X proceeding has been dismissed, its trustee discharged, and no substitution has been made by the receiver subsequently appointed in an ordinary bankrupt proceeding?

(2) Does the bankruptcy court in an ordinary bankruptcy proceeding have jurisdiction over an account receivable of a bankrupt corporation so as to render a personal judgment against the account debtor, absent the consent of the account debtor to this jurisdiction?

(2A) Can the filing of an answer by defendant-debtor in a suit by a trustee under Chapter X proceedings, where the United States District Court clearly had jurisdiction,

be construed as a consent to confer jurisdiction in the bankruptcy court in a subsequent bankruptcy proceeding?

I.

(1) There is no merit in appellant's contention that the motion to dismiss should have been granted because the Chapter X proceedings were terminated and the Chapter X trustee was no longer the real party in interest. The proceedings following the termination of Chapter X proceedings are continuous therewith, so that the person who is appointed the receiver or trustee in bankruptcy assumes the position of real party in interest formerly held by the Chapter X trustee.

(2) The language of Section 238 of the Bankruptcy Act, 11 USC 638, provides that proceedings after reorganization are to be conducted:

> " . . in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved."

The clear intent of this section is to "roll the clock back" so that matters commenced under the reorganization proceeding are treated as if begun under ordinary bankruptcy proceedings and the ordinary bankruptcy proceeding is treated as if begun when the reorganization proceedings began. In re Manufacturers Trading Corp., 194 F 2d 961 [CA 6, 1952]; In the Matter of Atlas Sewing Centers Inc, 437 F 2d 607, 614 [CA 5, 1971].

Colliers on Bankruptcy, Fourteenth Edition, Volume 6A, Section 12.05 (3),

dealing with results following the entry of an order that bankruptcy be proceeded with, states the rule:

> "(U)pon failure of the reorganization and the entry of an order under Section 236 (2), the proceeding in effect becomes one of involuntary bankruptcy. The order directing bankruptcy liquidation, however, does not initiate a new bankruptcy proproceeding at that point; the order instead is merely one in a continuous proceeding begun when the original petition for bankruptcy is filed." (emphasis in original footnotes omitted)

(3) It is clear, thus, that the proceedings following the entry of an order that bankruptcy be proceeded with are a continuation of the Chapter X proceedings. As such, there is no reason why the receiver or trustee in bankruptcy should not step into the shoes of the Chapter X trustee as the real party in interest. Section 238 states:

> " (a) trustee shall be elected or appointed pursuant to section 72 of this title and shall supersede any trustee previously appointed."

This last-quoted language clearly implies that the trustee in bankruptcy, when appointed, shall take over from the Chapter X trustee. Due to the continuous nature of the proceedings, there is no reason why the receiver in bankruptcy would not stand in the same position.

(4) Accordingly, upon the appointment of a receiver, the receiver became the real party in interest to the action commenced by the Chapter X trustee. It is irrelevant that the receiver had not been appointed when appellant filed his motion to dismiss. Bankruptcy Rule 717, making Rule 17 of the Federal Rules of Civil Procedure applicable to bankruptcy pro-

ceedings, allows a reasonable time after objection for substitution. The delay of six days between objection and appointment of the receiver was not unreasonable.

II.

Appellant also maintains that his motion to dismiss should have been granted because a bankruptcy court may not exercise its jurisdiction to enforce a debt against a debtor of the bankrupt without the debtor's consent. There is support in authority for appellant's position, but for the reasons stated herein, the Court is of the opinion that the controlling rule is that the bankruptcy court may determine and enforce the rights of various claimants to any property which is within its possession.

Although it is well established that a

court of bankruptcy may determine the rights of claimants to property within its possession, this rule has been held inapplicable where the property consists of a chose in action and the trustee is undertaking to enforce the bankrupt's claims against the debtor. In general, see Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.05. There is no valid reason for imposing this distinction.

Colliers, supra, at 23.05 (4) states that a bankruptcy court may determine the rights of various claimants to an intangible which is within its constructive possession.

> "Where the intangible consists of a chose in action, such as a debt or a contract claim, such intangible may be said to be in the constructive possession

> of the bankruptcy court so as to enable the court summarily to determine the rights of various claimants to the chose in action, if the bankrupt remained the legal owner up to the time of filing of the petition." (footnote omitted)

If the bankruptcy court may determine the rights of claimants to a chose in action, it may also enforce those rights against the debtor of the bankrupt. Section 2 (a) (7) of the Bankruptcy Act, 11 USC 11 (a) (7) (1970) creating the jurisdiction of the bankruptcy courts, confers original jurisdiction in both law and equity to:

> "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise herein provided."

(5) If a chose in action is within the estate of the bankrupt, Section 2 (a) (7) does not limit the bankruptcy court to determining

controversies but also empowers the court to collect the debt.

(6) The only limitation imposed on Section 2 (a) (7) is that stated in Section 23 of the Bankruptcy Act, which makes the act inapplicable to certain suits by the trustee or receiver against adverse claimants. It is well settled that this section does not limit the jurisdiction of the Bankruptcy Court where the court has the property in question in its possession. Thus, in Murphy v John Hoffman Co., 211 US 562, 568-569, 29 S Ct 154, 53 L Ed 327, 330 (1909), in discussing the jurisdiction of bankruptcy courts under the statute, the Supreme Court stated:

> "Jurisdiction . . . is limited to courts where the bankrupt himself could have prosecuted the action . . .

> but where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal and State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property."

Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.04 (2) states the same rule:

> "The power of a bankruptcy court to act summarily regarding controversies over property in its actual or constructive possession, and proceedings arising in the course of administration, is not in any way restricted by the terms of § 23." (footnotes omitted.)

The question, thus, is why a court in bank-

ruptcy may not enforce a chose in action against the obligor thereon where such is within the court's constructive possession. The answer traditionally given is that the procedure in bankruptcy is primarily summary, as opposed to an adversary procedure, and that it requires a plenary action with adversarial procedures to enforce a chose in action.[1] This view was echoed by this court in the case of In the Matter of Hammond Standish & Co, 126 F Supp 353, 355 (ED Mi 1954), where the court held that the bankruptcy court could not exercise its jurisdiction to enforce a chose

[1] The summary-plenary distinction relates to procedural rights and does not per se define jurisdiction. Matter of Tax Assn. of Illinois, 305 US 160, 59 S Ct 131, 83 L Ed 100 (1938), reh den 305 US 674, 59 S Ct 247, 83 L Ed 437

in action against the debtor without the debtor's consent. Quoting from In Re Standard Gas & Electric Co, 119 F 2d 658, 661-662 /_ CA 3, 1941 _/, this court stated:

> "In a broad sense a claim by a third person is property of the debtor. As such the reorganization court may direct the prosecution by the trustee of the debtor if it is appropriate to do so in order to effect the debtor's reorganization. But it is a species of property which may only be realized upon for the benefit of the debtor and its creditors by the successful prosecution of a plenary suit against the third persons involved."

(7) This distinction between property claims which may be enforced summarily and those which require resort to an adversarial procedure is no longer a viable basis on which to determine whether the bankruptcy court may exercise its jurisdiction.

The new Bankruptcy Rules, in Part VII,

make complete provisions for adversary proceedings. Rule 701, in particular, states that these rules govern any proceeding instituted by a party before a bankruptcy judge to recover money or property. Rule 102 states that all proceedings in the case, implicitly including adversary proceedings, are to be before the referee except as specifically provided. Given the clear intent of the new rules that adversary proceedings be donducted before the referee, and these rules having made ample provision for adversary proceedings, there no longer remains any reason to deny the bankruptcy court this aspect of the jurisdiction conferred upon it.

This district's proposed local rules fully support this approach. Proposed Rule 3, Local Rules in Bankruptcy of the United

States District Court for the Eastern District of Michigan, authorizes the Bankruptcy Judges of this District Court to exercise all of the authority with which they have been empowered:

> "3. JURISDICTION.
>
> The Bankruptcy Judges of this District Court shall have concurrent jurisdiction in all divisions of this district, and they and each of them are hereby empowered and authorized to do all acts, conduct all proceedings, render all judgments and orders and perform all duties as prescribed by the Bankruptcy Act, the Rules of Bankruptcy Procedure, these rules or the rules of the United States District Court applicable in a civil action."

(8, 9)Thus, in deciding whether the bankruptcy court has jurisdiction, the court need not look into whether an adversary procedure is proper. Rather, the test for jurisdiction in the bankruptcy court is whether it has possession, either actual or constructive, of the property in question.

McCullough v Matimore, 271 F 2d 161 (CA 6, 1959); In the Matter of Lehigh Valley RR, 458 F 2d 1041 (CA 3, 1972). The bankruptcy court has constructive possession of a chose in action if the bankrupt remained the legal owner thereto up to the time of filing the petition and if there is not a bona-fide dispute as to the actual existence of the chose in action. Willyerd v Buildex Co, 463 F 2d 996 (CA 6, 1972); Collier on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.05, footnote 30 and cases cited therein.

Applying these considerations to the instant case, the bankruptcy judge conducted a hearing at which time he determined that appellant's claim of adversity was colorable only. Appellant does not challenge this finding, but asserts instead that a chose in action cannot be

enforced in a court of bankruptcy because resort to a plenary procedure is required. If appellant's claim of adversity was colorable only, though, the bankruptcy court would have jurisdiction, as there would not be a bona-fide dispute as to the existence of the chose in action.

(10) The court's review of the record satisfies it that the bankruptcy court does have jurisdiction. The Chapter X trustee, in filing suit against Rocco Ferrera & Co, alleged that plaintiff delivered and sold to the defendant merchandise in a sum exceeding $110,00, which amount remains unpaid. Defendant, in its answer, admitted the existence of the contract and the delivery of the goods, but alleged that plaintiff did not furnish the goods agreed upon. Accepting the allegations of the plaintiff, defendant

owes it money. Accepting the allegations of the defendant, it has property belonging to plaintiff in its possession. Defendant's general denial of liability does not oust the bankruptcy court of jurisdiction. In the Matter of Four Seasons Nursing Centers of America Inc, 472 F 2d 744 (CA 10, 1972); Spach v. Johnina, 291 F 2d 619 (CA 5, 1961), cert den 368 US 985, 82 S Ct 599, 7 L Ed 2d 523.

II A.

(11) Even if it did not have the property in question within its constructive possession, the bankruptcy court would have jurisdiction to enforce the obligation of appellant to the bankrupt. During the Chapter X proceedings, but after the proceedings had been referred to the referee to collect receivables, appellee filed the claim in question and

appellant responded by filing an answer and a counterclaim. Appellant's filing of a counterclaim was a clear consent to the jurisdiction of the bankruptcy court.

Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.08 (1) states the well-recognized rule that the bankruptcy court acquires jurisdiction over a claim involving property which is not in its possession by the consent of the adverse claimant:

> "It is well settled that in all cases where a party is entitled to the determination of his rights in a plenary action, he may nevertheless consent to the exercise of summary jurisdiction by the bankruptcy court and in that manner have his rights adjudicated."

(12-14) The filing of a counterclaim is an unequivocal consent to the bankruptcy court's jurisdiction when done without objection.

Tamasha Town and Country Club v.

McAlester Construction Finance Corp, 252 F Supp 80 (SD Cal, 1966); James Talbot Inc v. Glavin, 104 F 2d 851 (CA 3, 1939), cert den 308 US 598, 60 S Ct 130, 84 L Ed 501. It is irrelevant that the bankruptcy judge was sitting by reference curing Chapter X proceedings. The referee, the same as a judge of bankruptcy in ordinary bankruptcy proceedings, has no power to hear the issues involved in regards to property in the possession of one who is asserting an adverse claim. Weidhorn v. Levy, 253 US 268, 40 S Ct 534, 64 L Ed 898 (1920). In general, see Colliers on Bankruptcy, Fourteenth Edition, Volume 6, Section 3.13. Since the jurisdiction of a referee and of a judge in bankruptcy in ordinary bankruptcy proceedings are the same in this respect, appellant's consent to the

Referee's jurisdiction is equally a consent to the jurisdiction of the court in the later bankruptcy proceedings. As was fully discussed in part I of this Opinion, the bankruptcy proceedings are continuous with the Chapter X proceedings and are to be conducted as far as possible as if the bankruptcy proceedings were commenced when the Chapter X proceedings were commenced. Moreover, a consent to jurisdiction, once given, cannot be withdrawn. Operators' Piano Co v First Wisconsin Trust Co, 283 Fed 904 (CA 7, 1922).

For all of these reasons, the finding of the Bankruptcy Court that it has jurisdiction over the claim in question is affirmed and the case is remanded for trial.

IT IS SO ORDERED.

No. 77-469

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

ROCCO FERRERA & Co.,
a Michigan Corporation,

Petitioner,

vs.

HAROLD MORRISON, TRUSTEE OF
ATLAS CONCRETE PIPE, INC.,
and/or ATLAS CONCRETE
CONDUIT, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

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BRIEF IN OPPOSITION FOR RESPONDENT

By: ROBERT L. SEGAR

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Flint, Michigan 48502

Special Counsel to Trustee

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INDEX

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a bankruptcy court in an ordinary bankruptcy proceeding, which has ensued from an aborted Chapter X proceeding, has jurisdiction to render a personal judgment against an account debtor of the bankrupt where the Chapter X Trustee commenced a civil suit to collect the receivable in the United States District Court; the suit was referred to the bankruptcy judge; and the account debtor filed an answer to the complaint without contesting jurisdiction subsequent to the referral, but before the transition to straight bankruptcy.

RESPONDENT ACCEPTS THE STATEMENT OF THE CASE BY PETITIONER

ARGUMENT

A. The Propriety of the Original Reference

As the Court of Appeals correctly pointed out, the critical issue in this case involves the propriety of the reference to the bankruptcy judge by the district judge in the Chapter X proceedings of the account receivable due from Petitioner. Petitioner acknowledges that the Federal District Court in reorganization possessed the requisite jurisdiction, but denies that the bankruptcy judge had jurisdiction in the straight bankruptcy proceedings. By implication, Petitioner asserts that the bankruptcy judge did not have jurisdiction after the reference but before the transfer to straight bankruptcy.

However, despite this implication, Petitioner does not answer the reasoning of the court below that the district judge could properly refer the collection of the account receivable to the bankruptcy judge in the Chapter X proceeding. (See *Morrison, et al,* v. *Rocco, etc.,* Docket No. 76-1165, C.A. 6, 1977) Petitioner indicates that it would have objected to the jurisdiction of the bankruptcy judge in the Chapter X proceedings, but does not say on what basis.

Respondent believes that the reason for this gap in Petitioner's argument is that there is no viable argument with which to dispute the power of the district court in reorganization to refer the collection of any account receivable to the bankruptcy judge. Section 117 of the Bankruptcy Act gives broad power in this regard to the district judge; and Respondent, just as the Court of Appeals, is unable to find in the Act any language indicating that the type of matter here involved is "reserved to the judge."

B. Petitioner's "Consent" to Jurisdiction

In any event, Petitioner, by filing its answer without raising the jurisdictional question, assuming that one existed, waived any right to do so. (6 Collier, Para. 3.06 (14th Ed)) As both the Court of Appeals and the district judge noted, the burden was on Petitioner to make such objection. It must be held to be put on notice of the possibility of an order of reference being entered once it was served with a pleading in a Chapter X proceeding.

Further, Respondent believes that the Fifth Amendment — Due Process argument of Petitioner has never been formally raised before in the lower courts (although briefly mentioned in Petitioner's application for rehearing in the Court of Appeals) and, therefore, has not been expressly ruled upon. It would not be in accord with the usual policy of this court to rule on a constitutional question not previously raised and which the lower courts have not had an opportunity to determine.

Although Petitioner states that the ruling of the court below is in conflict with rulings of other circuits, the Respondent is not aware of any case cited by Petitioner which deals with the peculiar fact situation involved here, that is a consent to jurisdiction at a time when the collection of an account receivable was before the bankruptcy judge by reference and a subsequent transfer into straight bankruptcy.

It is worth noting that the new bankruptcy rules have given plenary procedures to the bankruptcy courts and there may, no doubt, be a proper case for this court to decide the effect of those rules on the traditional distinction of summary versus plenary jurisdiction. However, in this case it is clear that the decision of the Court of Appeals rested not upon any such distinction, but primarily upon the waiver and consent to jurisdiction by Respondent. Whether plenary or summary, the matter was a "proceeding" which could be referred to the bankruptcy judge and even if it were deemed plenary, he was possessed of jurisdiction by virtue of the action of Petitioner in filing an answer and counterclaim before him without objection.

Finally, under the Bankruptcy Act, the subsequent bankruptcy proceedings are deemed continuous and, as noted by the Court of Appeals, it would be a strange and illogical result for the law to require that proceedings and possibly judgments rendered under Chapter X jurisdiction be avoided in the event of an aborted reorganization and subsequent bankruptcy because independent jurisdiction in straight bankruptcy is not present. (See *Morrison, et al,* v. *Rocco, etc.,* Docket No. 76-1165, C.A. 6, 1977. See also

Matter of Wil-Low Cafeterias, Inc., 111 F2d 83 (CCA2d, 1940); and *In Re Manufacturers Trading Corp.*, 194 F2d 961 (C.A. 6th, 1952))

CONCLUSION

It is respectfully submitted that there are no proper reasons (within Rule 19 or otherwise) to support the Petition for Writ of Certiorari. The lower courts correctly disposed of the case by applying correct and well-established principles of law, and certiorari should be denied.

ROBERT L. SEGAR
Special Counsel to Trustee

DATED: October 3, 1977.